

DOCKET



SUPREME COURT OF THE UNITED STATES

No. 11-5683

Title: Edward Dorsey, Sr., Petitioner

v.

United States

Docketed: August 5, 2011

Lower Ct: United States Court of Appeals for the Seventh Circuit

Case Nos.: (10-3124)

Decision Date: March 11, 2011

Rehearing Denied: May 25, 2011

Questions

Presented

~~~Date~~~ ~~~~~Proceedings and Orders~~~~~

Aug 1 2011 Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 6, 2011)

Aug 25 2011 Order extending time to file response to petition to and including October 6, 2011.

Oct 4 2011 Order further extending time to file response to petition to and including November 7, 2011.

Oct 25 2011 Memorandum of respondent United States filed.

Oct 26 2011 Reply of petitioner Edward Dorsey, Sr. filed.

Nov 8 2011 DISTRIBUTED for Conference of November 22, 2011.

Nov 28 2011 Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The petition for a writ of certiorari in No. 11-5721, Hill v. United States, is granted. The cases are consolidated and a total of one hour is allotted for oral argument.

Nov 29 2011 Miguel A. Estrada, Esquire, of Washington D.C., is invited to brief and argue these cases, as amicus curiae, in support of the judgments below. VIDEDED

Jan 5 2012 The time to file the joint appendix and petitioners' briefs on the merits is extended to and including January 25, 2012. VIDEDED.

Jan 5 2012 The time to file the brief of the Court-appointed amicus curiae in support of the judgment below is extended to and including March 8, 2012. VIDEDED.

Jan 25 2012 Brief of respondent United States supporting petitioners filed. VIDEDED.

Jan 25 2012 Joint appendix filed. (Statement of costs filed)

Jan 25 2012 Brief of petitioner Edward Dorsey, Sr. filed.

Jan 30 2012 Brief amici curiae of American Civil Liberties Union, et al. filed. VIDEDED.

Feb 1 2012 Brief amici curiae of Former United States District Court Judges Paul G. Cassell and Nancy Gertner filed. VIDEDED.

Feb 1 2012 Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDEDED.

Feb 1 2012 Brief amicus curiae of Center on the Administration of Criminal Law, New York University School of Law filed. VIDEDED.

Feb 3 2012 SET FOR ARGUMENT ON Tuesday, April 17, 2012.

Feb 10 2012 Motion for divided argument filed by petitioners. VIDEDED.

Feb 15 2012 Motion for divided argument filed by respondent United States. VIDEDED.

Feb 16 2012 Response of petitioners to motion of the Solicitor General for divided argument. VIDEDED.

Feb 17 2012 CIRCULATED.

Feb 17 2012 Record from U.S.D.C. for Seventh Circuit is electronic.

Feb 17 2012 Record from U.S.D.C. for Eastern District of Wisconsin is electronic

Feb 27 2012 Motion of petitioners for divided argument DENIED. VIDEDED.

Feb 27 2012 Motion for divided argument filed by respondent GRANTED. VIDEDED.

Mar 8 2012 Brief amicus curiae of Court-appointed amicus curiae in support of the judgments below filed. VIDEDED. (Distributed)

Apr 6 2012 Reply of petitioner Edward Dorsey, Sr. filed. (Distributed)

Apr 9 2012 Reply of respondent United States filed. VIDEDED. (Distributed)

Apr 17 2012 Argued. For petitioners: Stephen E. Eberhardt, Tinley Park, Ill. For respondent in support of petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. For amicus curiae: Miguel A. Estrada, Washington, D. C. (Appointed by this Court.)

Jun 21 2012 Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined. VIDEDED

Jul 23 2012 JUDGMENT ISSUED.

**PETITION
FOR
WRIT OF
CERTIORARI**

11-0083
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2011

EDWARD DORSEY SR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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QUESTION PRESENTED

Did the Seventh Circuit err when, in conflict with the First and Eleventh Circuits, it held that the Fair Sentencing Act of 2010 does not apply to all defendants sentenced after its enactment?

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No. _____

IN THE
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OCTOBER TERM 2011

EDWARD DORSEY SR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioner, EDWARD DORSEY SR., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, issued on March 11, 2011, and published at 635 F.3d 336, affirming the Petitioner's conviction and sentence. Petitioner sought rehearing *en banc*, but the Seventh Circuit denied rehearing *en banc* in a published decision issued on May 25, 2011, with two Judges dissenting, – F.3d. –, 2011 WL 2022959 (7th Cir. May 25, 2011).

OPINION BELOW

The Seventh Circuit's decision is published at 635 F.3d 336 (7th Cir. 2011), and

appears in Appendix A to this Petition. The Seventh Circuit's denial of rehearing *en banc*, and the dissent from the denial of rehearing *en banc*, is awaiting publication, although it is available at 2011 WL 2022959 (7th Cir. May 25, 2011). It appears in Appendix B to this Petition.

JURISDICTION

1. The Central District of Illinois originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.
2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Seventh Circuit affirmed Petitioner's conviction and sentence on March 11, 2011, and denied Petitioner's Petition for Rehearing *en banc* on May 25, 2011.
3. Petitioner seeks review in this Court of the Seventh Circuit's published opinion affirming his conviction and sentence pursuant to 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the Seventh Circuit's denial of the Petition for Rehearing *en banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), with text set forth in Appendix C pursuant to Sup.Ct.R. 14(1)(f).

1 U.S.C. § 109 provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty,

forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT OF THE CASE

On January 7, 2009, a federal grand jury in the Central District of Illinois returned a one-count indictment against Petitioner Dorsey, charging him with possession with intent to distribute five grams or more of crack cocaine on August 6, 2008, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(B)(iii) ("Count One"). (R-1). On April 20, 2009, the government filed an information, pursuant to 21 U.S.C. § 851, seeking enhanced penalties in light of Petitioner's prior felony drug convictions. (R-10). On June 3, 2010, Petitioner pleaded guilty to Count One. (R-30 at 38-39). He admitted that he possessed with intent to distribute approximately 5.5 grams of crack cocaine. (Id. at 16-17, 32).

On July 29, 2010, the probation officer prepared the Presentence Investigation Report ("PSR"). Using the November 1, 2009 Guidelines Manual, the probation officer first set Petitioner's base offense level at 24, pursuant to U.S.S.G. § 2D1.1(c)(8), because Petitioner was responsible for 5.5 grams of crack cocaine. (PSR at 5). With a two-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a), Petitioner's total offense level was 22. (Id.). With an offense level of 22 and a criminal history category of VI, Petitioner's advisory guidelines range was 84 to 105 months' imprisonment. (Id. at 14). Because Count One involved more than 5 grams of crack cocaine, and because the government filed the § 851 information, however, Petitioner faced a mandatory minimum 10-year sentence, which became the guidelines range, U.S.S.G. § 5G1.1(b).

One day prior to the sentencing hearing, on September 9, 2010, Petitioner filed a sentencing memorandum, asking the district court to sentence him under the Fair Sentencing Act of 2010, which was signed into law on August 3, 2010. (R-20); Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372 (2010) (available at Appendix C). Petitioner asked to be sentenced under the Fair Sentencing Act because, under the Act, he would not have been subject to a 10-year mandatory minimum sentence. That is so because the Fair Sentencing Act increased the quantities of crack cocaine necessary to trigger the mandatory minimum penalty provisions for drug trafficking offenses in 21 U.S.C. § 841(b)(1)(A)(iii) & 21 U.S.C. § 841(b)(1)(B)(iii). § 2, 124 Stat. at 2372.¹ Because Petitioner possessed less than 28 grams of crack cocaine, he was not subject to a mandatory minimum sentence under the Fair Sentencing Act. Id.

At the sentencing hearing on September 10, 2010, the district court adopted the PSR and overruled Petitioner's request to be sentenced under the Fair Sentencing Act

¹As discussed in detail below, the Fair Sentencing Act did a number of other things, two of which are particularly relevant to this appeal: (1) in Section 8, Congress ordered the Sentencing Commission, "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act," to promulgate amendments to the United States Sentencing guidelines to conform with the new statutory mandatory minimums in the Act; and (2) in Section 10, Congress ordered the Sentencing Commission to submit to Congress a report, "[n]ot later than 5 years after the date of enactment," "regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act." The Act also: (3) increased the quantity of crack cocaine necessary to trigger the penalty provisions in 21 U.S.C. § 960(b)(1)(C) & (2)(C); (4) eliminated the 5-year mandatory minimum sentence for possession of crack cocaine in 21 U.S.C. § 844(a); (5) increased the fines for violations of 21 U.S.C. §§ 841(b)(1)(A), (B) & 960(b)(1), (2); (6) ordered the Commission to amend the drug trafficking guidelines to include a number of specific-offense-characteristic increases and decreases; and (7) ordered the Comptroller General to submit a report to Congress on the effectiveness of drug court programs. 124 Stat. at 2372-75.

because Petitioner committed the underlying criminal conduct prior to the Act's enactment. (R-31 at 13, 16-17). The district court sentenced Petitioner to the 10-year mandatory minimum sentence, to be followed by a mandatory minimum 8-year term of supervised release, and imposed a \$100 mandatory special assessment. (Id. at 29-30).

On September 13, 2010, Petitioner filed a timely Notice of Appeal. (R-26). On November 12, 2010, Petitioner filed a motion to consolidate his appeal with another criminal defendant's appeal. (App. R-9). That defendant, Anthony Fisher², who was also represented by the Federal Public Defender for the Central District of Illinois, had recently filed a brief arguing that the Fair Sentencing Act applied to all appeals pending on the date of the Act's enactment. (See Appeal No. 10-2352). Although Fisher was sentenced prior to the date of the Act's enactment, and Petitioner was sentenced after the date of the Act's enactment, Petitioner sought consolidation to adopt the arguments raised by Fisher in his brief. (App. R-9 at 8). The Seventh Circuit granted the motion and consolidated the cases on November 19, 2010. (App. R-11).

On December 6, 2010, Petitioner filed his Opening Brief. (App. R-15). Petitioner adopted the arguments raised in Fisher's brief. (Id. at 14-16). Those arguments were two-fold. Petitioner first asserted that, because the Fair Sentencing Act did not contain a savings clause, and because it was penal in nature, it applied to cases pending on appeal and cases pending sentencing on the date of the Act's enactment. (Id.; Fisher Opening

²Because Mr. Fisher was sentenced prior to the Fair Sentencing Act's enactment, rather than after its enactment like Petitioner, he will file a separate Petition for a Writ of Certiorari in this Court.

Br. at 11-20). Petitioner then presented the following four reasons why the general savings statute, 1 U.S.C. § 109, did not save the prior statute: (a) Petitioner did not seek a technical abatement of his conviction; (b) the Fair Sentencing Act did not "release or extinguish" any penalty, but rather remedied a flawed definition in § 841(b); (c) nothing indicated that Congress intended to save the former legislation; and (d) the Fair Sentencing Act's purpose—to right a racially discriminatory wrong—precluded the general savings statute's application (*Id.* at 20-35).

Petitioner also presented two arguments that the Fair Sentencing Act applied to his case because he was sentenced after the Act's enactment. First, relying on the logic expressed in *United States v. Douglas*, 746 F.Supp.2d 220 (D. Me. 2010) (Hornby, J.), *aff'd*, — F.3d. —, 2011 WL 2120163 (1st Cir. May 31, 2011), Petitioner asserted that Section 8 of the Fair Sentencing Act necessarily implied that Congress intended the Act to apply to all those sentenced after its enactment. (App. R-15 at 17-20, 27-31). This was so because Section 8 granted emergency authority to the Sentencing Commission to enact amendments to the crack cocaine guidelines to conform with the new statutory mandatory minimum penalties in the Fair Sentencing Act. § 8, 124 Stat. at 2374.³ In light of this emergency authority, it was clear that "Congress did not want federal judges to

³In response to Section 8, the Commission drafted an emergency amendment to U.S.S.G. § 2D1.1, effective November 1, 2010. United States Sentencing Commission, Supplement to the 2010 Guidelines Manual, intro. letter dated Oct. 18, 2010. That amendment will apply retroactively absent Congressional action to the contrary. Press Release, U.S. Sentencing Commission, *U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively* (June 30, 2011), available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases

continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before enactment." *Douglas*, 746 F.Supp.2d at 231.

Second, citing *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), Petitioner argued that the relevant retroactivity event for purposes of the Fair Sentencing Act was the date of sentencing, not the date of the underlying criminal conduct. (*Id.* at 22-24, 28). Because Petitioner was sentenced after the Act's enactment, he asserted that the Act applied to his case. (*Id.*).

In its Response Brief, the government disagreed, citing the general savings statute, 1 U.S.C. § 109. (App. R.-16 at 13-22). Petitioner filed a Reply Brief, rebutting the government's arguments. (App. R-17). The case was argued orally on February 15, 2011.

On March 11, 2011, a panel of the Seventh Circuit affirmed. *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011) (available at Appendix A). After opining that the "Fair Sentencing Act of 2010 (FSA) might benefit from a slight name change: The Not Quite as Fair as it could be Sentencing Act of 2010 (NQFSA)," the Seventh Circuit held: "the FSA does not apply retroactively, and [we] further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Id.* at 338, 340. The Seventh Circuit rejected Petitioner's argument that the plain language of the Fair Sentencing Act suggested otherwise, noting its belief that, "if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the

Sentencing Commission." *Id.* at 339-40. It reached this conclusion despite its candid admission that Petitioner (and Fisher) "were sentenced under a structure which has now been recognized as unfair." *Id.* at 340. This decision was the first published decision by a Court of Appeals to address the issue presented by Petitioner.⁴

On March 23, 2011, Petitioner filed a timely Petition for Rehearing *en banc*. (App. R-33). The Seventh Circuit ordered the government to file an Answer, which it did on April 19, 2011. (App. R-34, 36). On May 25, 2011, the Seventh Circuit denied rehearing *en banc*, with two Judges dissenting in a published decision. *United States v. Fisher*, - F.3d -, 2011 WL 2022959 (7th Cir. May 25, 2011) (available at Appendix B). In dissent, Judge Williams, joined by Judge Hamilton, concluded that the Fair Sentencing Act should apply to all defendants sentenced after the date of its enactment, citing Section 8 of the Act. *Id.*, 2011 WL 2022959 at *2-3. This timely Petition follows.

REASONS FOR GRANTING THE WRIT

Petitioner seeks a writ of certiorari from this Court because the Seventh Circuit's published decision in this case conflicts with published decisions from the First and Eleventh Circuits, as well as decisions of at least 45 district courts. Moreover, as of July 15, 2011, the United States Government now agrees with Petitioner that the Seventh Circuit's decision in this case (*Fisher*) is incorrect. The following explains the reasons for granting this Petition. Section A explores the ineluctable conflict that has arisen on the

⁴For those criminal defendants sentenced prior to the Fair Sentencing Act's enactment, the Courts of Appeals have unanimously rejected their requests to be resentenced under the Act, citing the general savings statute, 1 U.S.C. § 109. See *United States v. Powell*, - F.3d -, 2011 WL 2712969 at *6 (7th Cir. July 13, 2011) (collecting cases).

issue presented in this Petition: whether the Fair Sentencing Act of 2010 applies to all individuals sentenced after its enactment. Section B explains why the Seventh Circuit erred when it held that the Fair Sentencing Act does not apply to all individuals sentenced after its enactment:

A. This Court should grant the writ because the Seventh Circuit's published decision in this case conflicts with published decisions from the First and Eleventh Circuits, as well as decisions of at least 45 district courts, and the United States Government, which now agrees with Petitioner that the Seventh Circuit's decision in this case is incorrect.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup.Ct.R. 10. One such reason is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup.Ct.R. 10(a). Such is this case. The Seventh Circuit's published decision in this case, *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011), is in conflict with published decisions from the First and Eleventh Circuits. *United States v. Vera Rojas*, - F.3d -, No. 10-14662, 2011 WL 2623579 (11th Cir. July 6, 2011); *United States v. Douglas*, - F.3d -, No. 10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In *Fisher*, the Seventh Circuit rejected Petitioner's argument that the Fair Sentencing Act of 2010 applies to all defendants sentenced after its enactment. 635 F.3d at 339. The Seventh Circuit held that the Fair Sentencing Act "does not apply retroactively, and [we] further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Id.* at 340.

In conflict, the First Circuit has now held that the Fair Sentencing Act applies to all

criminal defendants sentenced on or after November 1, 2010, regardless of when the defendant committed the underlying criminal conduct. *Douglas*, 2011 WL 2120163 at *3-5. The First Circuit so held based on Section 8 of the Fair Sentencing Act, which directed the United States Sentencing Commission to promulgate new guidelines conforming to the Fair Sentencing Act, and to do so within 90 days of the Act's enactment. *Id.* at *1-2. Although the First Circuit did not consider the Fair Sentencing Act's application to a defendant, like Petitioner, who was sentenced "between August 3, 2010, when the FSA went into effect, and November 1, 2010, when the new 18:1 guidelines became effective", *id.* at *6, its ultimate holding, that the Act's application turns not on the date of the underlying criminal conduct, but on the date of sentencing, conflicts with the Seventh Circuit's decision in this case. Indeed, with respect to defendants like Petitioner, the First Circuit suggested that the Fair Sentencing Act applied, "especially if the Commission decides to make its guidelines changes retroactive," *id.*, which it did on June 30, 2011. Press Release, cited at n.3.

Similarly, as the Eleventh Circuit acknowledged, its published decision in *Vera Rojas* is in direct conflict with the Seventh Circuit's decision in this case. 2011 WL 2623579 at *2. In *Vera Rojas*, also relying on Section 8 of the Fair Sentencing Act, the Eleventh Circuit held that the Act applies "to sentencing conducted after its August 3, 2010, enactment", regardless of the date of the underlying criminal conduct. *Id.* at *1, 4-5. Accordingly, the Eleventh Circuit held that the defendant in that case was subject to a 5-year, rather than a 10-year, mandatory minimum sentence and remanded for

resentencing under the Fair Sentencing Act. *Id.* at *2.

As a practical matter, *Fisher* cannot coexist with *Vera Rojas* and *Douglas*. As it now stands, district courts in the Seventh Circuit cannot sentence a defendant under the Fair Sentencing Act if that defendant committed the underlying criminal conduct prior to August 3, 2010. *Fisher*, 635 F.3d at 339-40. In contrast, district courts in the Eleventh Circuit must sentence all defendants initially sentenced on or after August 3 under the Fair Sentencing Act, regardless of when the defendant committed the underlying criminal conduct. *Vera Rojas*, 2011 WL 2623579 at *4-5. Similarly, district courts in the First Circuit must sentence all defendants sentenced on or after November 1, 2010 (and arguably on or after August 3) under the Fair Sentencing Act, regardless of when the defendant committed the underlying criminal conduct. *Douglas*, 2011 WL 2120163 at *4.

In light of this Circuit split, this Court should grant this Petition. The issue is of exceptional importance. Criminal defendants should not receive higher sentences simply because they were sentenced in Illinois instead of Florida (as one example). The Fair Sentencing Act's application should not turn on geography; it should apply to all defendants sentenced after August 3, 2010, regardless of the location of a federal courthouse. Only this Court can resolve the conflict, and it should do so in this case.

That is especially true in light of the overwhelming disagreement with the Seventh Circuit's approach in this case. In line with *Douglas* and *Vera Rojas*, two Judges in the Seventh Circuit dissented from the denial of rehearing *en banc* in this case. *Fisher*, 2011 WL 2022959 (7th Cir. May 25, 2011) (Williams, J., dissenting). Those Judges also

concluded that, in light of Section 8 of the Fair Sentencing Act, the Act applied to all defendants sentenced after its enactment. *Id.* at *3. Similarly, there are at least 45 district court judges who have issued opinions or orders in conflict with the Seventh Circuit's decision in this case.⁵

⁵*United States v. Fowlkes*, 2011 WL 2650016 (C.D. Cal. July 1, 2011) (Snyder, J.); *United States v. Shull*, -- F.Supp.2d --, 2011 WL 2559426 (S.D. Ohio June 29, 2011) (Marbley, J.); *United States v. Brown*, 2011 WL 2457933 (W.D. Pa. June 16, 2011) (Lancaster, C.J.); *United States v. Burns*, No. 1:10-cr-80 (S.D. Miss. June 13, 2011) (Gex, J.); *United States v. Ned*, No. 10-cr-546 (N.D. Cal. May 10, 2011) (Seeborg, J.); *United States v. Watts*, -- F.Supp.2d --, 2011 WL 1282542 (D. Mass. Apr. 5, 2011) (Ponsor, J.); *United States v. Brown*, No. 09-cr-10281 (D. Mass. Mar. 28, 2011) (Gertner, J.); *United States v. Harris*, 2011 WL 1134983 (D. Minn. Mar. 25, 2011) (Tunheim, J.); *United States v. Foster*, No. 09-cr-35 (M.D. La. Mar. 25, 2011) (Brady, J.); *United States v. Beach*, 2011 WL 977766 (D. Kan. Mar. 17, 2011) (Melgren, J.); *United States v. Baltimore*, No. 3:09-cr-00032 (M.D. Tenn. Mar. 4, 2011) (Haynes, J.); *Holloman*, 765 F.Supp.2d 107 (C.D. Ill. 2011) (Mills, J.); *United States v. Newborn*, 09-cr-433-WYD (D. Colo. Feb. 24, 2011) (Daniel, C.J.); *United States v. Hodges*, 765 F.Supp.2d 1369 (M.D. Ga. 2011) (Sands, J.); *United States v. White*, 2011 WL 587100 (D. S.C. Feb. 9, 2011) (Anderson Jr., J.); *United States v. McKenzie*, No. 2:10-cr-00079 (E.D. Wash. Feb. 9, 2011) (Peterson, C.J.); *United States v. Jackson*, No. 1:10-cr-20 (N.D. Fla. Feb. 7, 2011) (Mickle, C.J.); *United States v. Robinson*, 763 F.Supp.2d 949 (E.D. Tenn. 2011) (Collier, J.); *United States v. Rolle*, No. 6:09cr103 (M.D. Fla. Feb. 4, 2011) (Antoon, J.); *United States v. Elder*, 2011 WL 294507 (N.D. Ga. Jan. 27, 2011) (Story, J.); *United States v. Francis*, No. 08-cr-271 (M.D. Fla. Jan. 26, 2011) (Scriven, J.); *United States v. Duncan*, 2:10-cr-0089-WFN (E.D. Wash. Jan. 26, 2011) (Nielsen, J.); *United States v. Cruz*, No. 10-cr-613 (N.D. Ill. Jan. 20, 2011) (Conlon, J.); *United States v. Cox*, 2011 WL 92071 (W.D. Wis. Jan. 11, 2011) (Conley, J.); *United States v. Vreen*, No. 6:10-CR-119 (M.D. Fla. Jan. 10, 2011) (Conway, C.J.); *United States v. Johnson*, No. 6:08-cr-270-Orl-31KRS (M.D. Fla. Jan. 4, 2011) (Presnell, J.); *United States v. Jones*, No. 4:10-cr-00233, docket entry #21 (N.D. Ohio Jan. 3, 2011) (Dowd, J.); *United States v. English*, 757 F.Supp.2d 900 (S.D. Iowa 2010) (Pratt, J.); *United States v. Parks*, 2010 WL 5463743 (D. Neb. Dec. 28, 2010) (Bataillon, J.); *United States v. Curl*, No. 09-cr-734-ODW (C.D. Cal. Dec. 22, 2010) (Wright, J.); *United States v. Whitfield*, No. 2:10-cr-00013, docket #28 (N.D. Miss. Dec. 21, 2010) (Mills, J.); *United States v. Holloway*, No. 04-cr-00090, docket #72 (S.D. W.Va. Dec. 20, 2010) (Chambers, J.); *United States v. Ross*, 755 F.Supp.2d 1261 (S.D. Fla. 2010) (King, J.); *United States v. Gutierrez*, 4:06-cr-40043 (D. Mass. Dec. 17, 2010) (Saylor, J.); *United States v. Johnson*, No. 3:10-cr-00138, docket entry # 26 (E.D. Va. Dec. 6, 2010) (Payne, J.); *United States v. Gillam*, 753 F.Supp.2d 683 (W.D. Mich. 2010) (Neff, J.); *United States v. Spencer*, No. 5:09-cr-00400, docket entry #81 (N.D. Cal. Nov. 30, 2010) (Ware, J.); *United States v. Jaimesperimentz*, No. 09-cr-488-3 (E.D. Pa. Nov. 24, 2010) (Baylson, J.); *United States v. Favors*, No. 1:10-cr-00384, docket entry 34 (W.D. Tex. Nov. 23, 2010) (Yeakel, J.); *United States v. Carter*, No. 08-cr-299 (N.D.N.Y. Nov. 22, 2010) (Scullin, J.); *United States v. Garcia*, No. 09-cr-1054 (S.D.N.Y. Nov. 15, 2010) (Scheindlin, J.); *United States v. Shelby*, No. 2:09-cr-00379, docket entry #49 (E.D. La. Nov. 10, 2010) (Barbier, J.);

Finally, there is one more reason why this Court should grant this Petition: the government now agrees that the Fair Sentencing Act applies to Petitioner's case. (See Memorandum For All Federal Prosecutors, from Attorney General Eric H. Holder Jr., dated July 15, 2011) (hereinafter Holder Memorandum) (available at Appendix D). In at least one appeal in the Seventh Circuit, the government has filed a Notice of Changed Position, informing the court that it now believes that this case (*Fisher*) was wrongly decided. See *United States v. Holcomb*, No. 11-1558, docket entry #19. In a Memorandum to all federal prosecutors, the Attorney General, noting "the serious impact on the criminal justice system of continuing to impose unfair penalties", now agrees "with those courts that have held that Congress intended the Act not only to 'restore fairness in federal cocaine sentencing policy' but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date." (Holder Memorandum at 2).

As a practical matter, the government's concession amplifies the Circuit split in a number of ways. First, neither the First nor Eleventh Circuits will be asked to rehear the issue *en banc*, meaning that, as long as *Fisher* remains good law, the Circuit split on this issue will exist in perpetuity. Second, defendants sentenced by one of the many district court judges outside of the Seventh Circuit who apply the Fair Sentencing Act to all post-enactment sentencing are guaranteed to receive fairer sentences under the Act, rightly or wrongly, as the government will not appeal those sentences. (See n.5).

United States v. Angelo, No. 1:10-cr-10004, entry 10/29/2010 (D. Mass. Oct. 29, 2010) (Zobel, J.); *Douglas*, 746 F.Supp.2d 220; *United States v. Dixson*, No. 8:08-cr-00360, docket entry #33 at 33 (M.D. Fla. Sept. 20, 2010) (Covington, J.).

For instance, a first-time offender responsible for 5.5 grams of crack cocaine and sentenced by Judge Snyder in the Central District of California will likely receive a sentence below the now-repealed 5-year mandatory minimum sentence (the guidelines range would be 12 to 18 months' imprisonment). *Fowlkes*, 2011 WL 2650016. In contrast, if that same defendant were sentenced by any district court judge within the Seventh Circuit, the judge would have to impose the 5-year mandatory minimum sentence. Moreover, if that defendant were sentenced by a district court judge outside of the First and Eleventh Circuits that does not apply the Fair Sentencing Act, that defendant would also receive the unfair 5-year mandatory minimum sentence.

To highlight the intractable nature of the current state of the law, consider the Western District of Pennsylvania. One judge applies the Fair Sentencing Act to all those sentenced after its enactment, *United States v. Brown*, 2011 WL 2457933 (W.D. Pa. June 16, 2011) (Lancaster, C.J.); other judges do not, *see United States v. Gadson*, No. 08-248, 2011 WL 542433 at *3 (W.D. Pa. Feb. 8, 2011) (McVerry, J.). Practically speaking, this means that two defendants, sentenced on the same day in the same courthouse for the exact same amount of crack cocaine, will arguably receive widely divergent sentences simply because of the judge who imposes sentence in each case. For instance, using the hypothetical above, the first-time offender who distributes 5.5 grams of crack cocaine would face an advisory guidelines range of 12 to 18 months' imprisonment before Chief Judge Lancaster, while a similarly situated defendant sentenced by Judge McVerry will receive no less than the now-repealed 5-year mandatory minimum sentence.

But enough of hypotheticals. As a practical matter in this case, Petitioner received a 10-year mandatory minimum sentence under § 841's repealed penalty provisions, despite the fact that his guidelines range under the Fair Sentencing Act would be 37 to 46 months' imprisonment (5.5 grams of crack cocaine = Level 16, minus 2 for acceptance, with criminal history category VI). Clearly, this issue is of exceptional importance to Petitioner and countless others like him.

In the end, as of now, because of its published decision in this case, the Seventh Circuit stands alone as the only Court of Appeals to refuse to apply the Fair Sentencing Act to individuals sentenced after its enactment. Moreover, two Judges from the Seventh Circuit disagree with the Seventh Circuit's decision in this case, as do at least 45 district court judges and the United States Government. The scope of the Fair Sentencing Act's application is of exceptional importance. Petitioner, and numerous others like him⁶, should not be denied the benefit of a fairer sentencing scheme merely because he was sentenced within the Seventh Circuit's jurisdiction. In light of the Circuit split on this issue and the overwhelming authority in disagreement with the Seventh Circuit's position, this Court should grant this Petition. Sup.Ct.R. 10(a).

⁶Although undersigned counsel has no idea how many criminal defendants within the Seventh Circuit would be eligible for a reduced sentence under the Fair Sentencing Act if *Fisher* were overruled, he knows of at least 18, including Petitioner, because that is how many individuals he represents on this issue in the Seventh Circuit. If one attorney in the Central District of Illinois represents 18 criminal defendants on this one issue, the number of defendants affected by this issue nationwide is obviously substantial.

B. This Court should grant the writ because the Seventh Circuit's published decision in this case is unsound.

The Seventh Circuit relied on the general savings statute, 1 U.S.C. § 109, to reject Petitioner's argument and to hold that the Fair Sentencing Act does not apply to any defendant who committed the underlying criminal conduct prior to the Act's enactment. *Fisher*, 635 F.3d at 339-40. This was error for a number of reasons. As Petitioner asserted below, the general savings statute has no application to his case because: (1) the Fair Sentencing Act necessarily implies that it applies to all individuals sentenced on or after its enactment; (2) Petitioner does not seek a technical abatement of his conviction; (3) the Act did not "release or extinguish" any penalty, but rather remedied an unfair definition in § 841(b); (4) because Petitioner was sentenced after the Act's enactment, he did not incur a penalty under the old provision; and (5) the Fair Sentencing Act's purpose – to right a racially discriminatory wrong – precludes the general savings statute's application. Each reason is discussed below.

Before doing so, however, it is important to note that, absent the general savings statute, the Fair Sentencing Act would undoubtedly apply to this case. As with all issues of statutory interpretation, such an inquiry would begin with the Act's plain language. *Dean v. United States*, 129 S.Ct. 1849, 1853 (2009). The Fair Sentencing Act, however, does not contain an "effective date" clause or a clause that saves the former legislation (i.e., a "savings clause"). 124 Stat. 2372. As such, because the issue concerns a new or amended statute's application, and because the statute is penal in nature, under the common law rule, there is a presumption that the new statute applies in all pending cases. *Kaiser*

Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 841 n.1 (1990) (Scalia, J. concurring); *Yeaton v. United States*, 5 Cranch 281, 283 (1809) (Marshal, C.J.) ("it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.").

That is so because a "contrary congressional intent" does not exist. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 432 (1972). Nowhere in the text of the Fair Sentencing Act did Congress evince an intent that the Act not apply to those sentenced after its enactment. *Fisher*, 2011 WL 2022959 at *2 (Williams, J., dissenting). As discussed below, Section 8 of the Fair Sentencing Act implies that Congress intended for the Act to apply immediately. *Id.*; *Vera Rojas*, 2011 WL 2623579 at *5; *Douglas*, 2011 WL 2120163 at *3-5; Holder Memorandum. The legislative history confirms this intent. See, e.g., *Douglas*, 2011 WL 2120163 at *4 (noting that Congress expressed no concern over sentencing individuals under the Fair Sentencing Act in the first instance); 155 Cong. Rec. S10491-S10493 (daily ed. Oct. 15, 2009); 156 Cong. Rec. S1680-S1683 (daily ed. Mar. 17, 2010); 156 Cong. Rec. H6196-6204 (daily ed. July 28, 2010).

Moreover, the only other similar legislation passed by Congress, the Comprehensive Drug Abuse Prevention and Control Act of 1970, contained a savings clause. *Bradley v. United States*, 410 U.S. 605, 608 (1973) ("[p]rosecutions for any violation of law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (it) . . . or abated by reason thereof.") "The absence of comparable

language in the [Fair Sentencing Act] cannot realistically be attributed to oversight or to unawareness of the retroactivity issue." *Landgraf*, 511 U.S. at 256. The present Congress was obviously aware of the 1970 Act. 156 Cong. Rec. S1681 (statement of Sen. Durbin) ("if this bill is enacted into law, it will be the first time since 1970—forty years ago—that Congress has repealed a mandatory minimum sentence").⁷

Yet, unlike the 1970 Act, Congress did not include a savings clause in the Fair Sentencing Act. "Had Congress had a similar intention here, it would have been so easy to have said so." *United States v. Obermeier*, 186 F.2d 243, 255 (2d Cir. 1950); *see also Hui v. Castaneda*, 130 S.Ct. 1845, 1851 (2010) ("Given Congress' awareness of pre-existing immunity provisions like § 233 when it enacted the Westfall Act, it is telling that Congress declined to enact a similar exception to the immunity provided by § 233(a)").

And so, because Congressional intent is consistent with the general common law presumption favoring the immediate application of penal legislation, the relevant question centers squarely on whether the general savings statute saves the former legislation. *Pipefitters Local*, 407 U.S. at 432. The general savings statute provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

⁷ Similarly, legislation nearly identical to the Fair Sentencing Act, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, HR 265, actually included a savings clause ("[t]here shall be no retroactive application of any portion of this Act"). 156 Cong. Rec. H6202. And so, if Congress wanted to save § 841(b)'s penalty provisions, it could have passed this Act instead, or it could have added a savings clause to the Fair Sentencing Act.

1 U.S.C. § 109. Congress originally enacted this statute in 1871. *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1965). “It was meant to obviate mere technical abatement”, and it was arguably in response to this Court’s decision in *United States v. Tynen*, 78 U.S. 88 (1870). *Hamm*, 379 U.S. at 314.

In *Tynen*, the defendant was indicted for submitting a false naturalization form and faced a term of imprisonment or a fine. 78 U.S. at 90. The statute was amended, however, while the case was pending in this Court. *Id.* at 91. The amendment reduced the penalties, but also provided that the court could impose both a prison sentence and a fine. *Id.* This Court held that the amended statute repealed the prior law, applied the common law rule, and dismissed the indictment, holding, “[t]here can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed.” *Id.* at 95. And so, when the 1871 Congress enacted the general savings statute in response to *Tynen*, it determined that “a substitution of a new statute with a greater schedule of penalties” should not “abate the previous prosecution.” *Hamm*, 379 U.S. at 314.

While the general savings statute was a response to *Tynen*, it was not a complete abandonment of the general common law rule. If it were, the general savings statute would preclude the application of new or amended statutes to all non-final cases. Yet, Supreme Court precedent since 1871 makes clear that the general rule is still very much alive. Indeed, of the nine Supreme Court cases involving amended or repealed criminal

statutes, four favor the general rule over the general savings statute, *Hamm*, 379 U.S. at 316-17; *Bridges v. United States*, 346 U.S. 209, 221 (1953); *Massey v. United States*, 291 U.S. 608 (1934); *United States v. Chambers*, 291 U.S. 217, 226 (1934), and, of the other five, four involved statutes that contained specific savings clauses, *Bradley*, 410 U.S. at 608; *Warden v. Marrero*, 417 U.S. 653, 710 (1974); *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 466 (1908); *United States v. Reisinger*, 128 U.S. 398, 400 (1888). In the other case, the issue was whether the prosecutions should abate. *Pipefitters Local*, 407 U.S. at 399 n.10.

This case law is consistent with the statutory canon that favors strict construction of statutes that are in derogation of the common law. See *Pasquantino v. United States*, 544 U.S. 349, 359 (2005). It also conforms with Congress's inclusion of savings clauses in some, but not all, legislation. Indeed, if the general savings statute applied as a general matter to all cases involving a repealed statute, there would be no reason for Congress ever to include specific savings clauses. Yet, Congress often includes such clauses, as it did in the 1970 Act.⁸ With this history in mind, Petitioner reiterates the five reasons he presented below as to why the general savings statute does not preclude the Fair Sentencing Act's application to all individuals sentenced after its enactment.

⁸*Bradley*, 410 U.S. at 608. For other examples of savings clauses, see *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 335-36 (2003) (ERISA); *Spiertsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-63 (2002) (Federal Boat Safety Act of 1971); *Sec'y of the Interior v. California*, 464 U.S. 312, 341 n.21 (1984) (Coastal Zone Management Act); *Carpenter v. Wabash Ry. Co. et al.*, 309 U.S. 23 (1940) (bankruptcy statute); *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 466 (1908) (Hepburn Act); *Skowronek v. Brennan*, 896 F.2d 264, 268 (7th Cir. 1990) (Sentencing Reform Act of 1984); *United States v. Marachowsky*, 213 F.2d 235, 241 (7th Cir. 1954); (bankruptcy statute); *Lovely v. United States*, 175 F.2d 312, 316 (4th Cir. 1949) (rape statute).

(1) The Fair Sentencing Act necessarily implies that it applies to all individuals sentenced after its enactment.

Below, Petitioner asserted that the text of the Fair Sentencing Act necessarily implied that it should apply to his case, citing Section 8 of the Act and this Court's decision in *Great Northern Ry. Co.*, 208 U.S. 452. The Seventh Circuit rejected the argument, stating, "if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the Sentencing Commission." *Fisher*, 635 F.3d at 339-40. In reaching this conclusion, the Seventh Circuit referred to the Fair Sentencing Act as "compromise legislation" with "strong rhetoric to be found on either side" of the debate. *Id.* at 339.

There are three noticeable flaws in the Seventh Circuit's decision. The first is its erroneous premise that the Fair Sentencing Act was "compromise legislation." That is inaccurate. In reality, the Fair Sentencing was bipartisan legislation, "negotiated and drafted by Democratic and Republican members of the Senate Judiciary Committee." 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Scott). The Act had near-unanimous support; it passed the Senate by unanimous consent and the House of Representatives by a voice vote. S.1789: Fair Sentencing Act of 2010, at <http://www.govtrack.us/congress/bill.xpd?bill=s11-1789>. During debate, only one Congressman spoke against the Act. 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Smith). To the extent that the Act was "compromise legislation," the compromise centered not on the need to reduce the disparity between crack and

powder cocaine, but on the extent of the reduction. *United States v. Williams*, – F.Supp.2d –, 2011 WL 1336666 at *25 (N.D. Iowa, Apr. 7, 2011). That compromise is irrelevant to this issue.

The second flaw is that the Seventh Circuit misunderstood the limited reach of the general savings statute. *See Fisher*, 2011 WL 2022959 at *3 (Williams, J., dissenting). The Seventh Circuit erroneously required a “direct statement” of Congressional intent, refusing to “read in by implication anything not obvious in the text of the FSA.” *Fisher*, 635 F.3d at 339-40. The general savings statute, however, does not require a direct statement. “[I]ts provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.” *Great Northern Ry. Co.*, 208 U.S. at 465; *see also Fletcher v. Peck*, 10 U.S. 87, 135 (1810) (“one legislature cannot abridge the powers of a succeeding legislature”). If a subsequent enactment “necessarily, or by clear implication, conflicts with [the general savings statute], the latest expression of the legislative will must prevail.” *Hertz v. Woodman*, 218 U.S. 205, 218 (1910); *see also Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (“an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute.”).

The third, and most serious, flaw in the Seventh Circuit’s decision is its conclusion that Congress did not “drop[] a hint” that it intended the Fair Sentencing to apply immediately. *Fisher*, 635 F.3d at 339-40. In fact, that is exactly what Congress did, in an emergency fashion, in Section 8 of the Act. *Id.* at *3; *Vera Rojas*, 2011 WL 2623579 at *4;

Douglas, 2011 WL 2120163 at *4. In Section 8, Congress ordered the Sentencing

Commission to:

promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event *not later than 90 days after the date of enactment of this Act . . . and . . . make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.*

124 Stat. at 2374 (emphasis added). In response, the Commission drafted an emergency amendment to U.S.S.G. § 2D1.1, effective November 1, 2010. United States Sentencing Commission, Supplement to the 2010 Guidelines Manual, intro. letter dated Oct. 18, 2010. That amendment, which will be made retroactive absent Congressional action to the contrary, increased the quantities of crack cocaine enumerated in the Drug Quantity Table, U.S.S.G. § 2D1.1(c), to reflect the increased quantities codified in 21 U.S.C. § 841(b) pursuant to the Fair Sentencing Act. *Id.*; U.S.S.G. § 2D1.1(c); Press Release, n.3.

In light of the guidelines, Section 8 of the Fair Sentencing Act necessarily implies that Congress intended the Act to apply immediately. *Vera Rojas*, 2011 WL 2623579 at *4. Pursuant to 18 U.S.C. § 3553(a)(4)(A)(ii), district courts must apply the guidelines that are in effect on the date of sentencing, not on the date of the underlying criminal conduct. *Vera Rojas*, 2011 WL 2623579 at *4; *Douglas*, 746 F.Supp.2d at 229 (“during the past two decades of the Guidelines’ existence, whenever the Commission has adopted Guideline amendments, those amendments have applied to all defendants sentenced thereafter, regardless of when the crime was committed.”).

If Congress wanted the *repealed* statute to apply to *future* sentencing proceedings,

Section 8's requirement that the Commission draft *conforming* amendments to the guidelines in order to achieve *consistency with applicable law* would make little sense. *Id.*; *Douglas*, 2011 WL 2120163 at *4; *Fisher*, 2011 WL 2022959 at *2-3 (Williams, J., dissenting). Congress obviously knew of § 3553(a)(4)(A)(ii) when it drafted the Fair Sentencing Act, and, yet, Congress ordered the Commission to draft guidelines amendments without delay. § 8, 124 Stat. at 2374. Indeed, given Section 8's directive, to amend the guidelines "not later than 90 days" after the Act's enactment, the Commission could have amended the guidelines at any time thereafter, including the next day after enactment. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.").

In light of this, Congress must have intended that the Commission would use the Fair Sentencing Act's revised statutory penalties as the "applicable law" when it drafted the "conforming" guidelines amendments. And that is precisely what the Commission did. United States Sentencing Commission, Supplement to the 2010 Guidelines Manual, intro. letter dated Oct. 18, 2010. Yet, under the Seventh Circuit's rationale, the term "applicable law" in Section 8 would vary depending on when the defendant committed the underlying criminal conduct. That reading is untenable. Only if the Fair Sentencing Act is itself the "applicable law" in future sentencing proceedings does there exist consistency and conformity with the Fair Sentencing Act's guidelines amendments.

The emergency nature of Section 8's directive amplifies this point. Congress ordered

the Commission to draft amended guidelines “as soon as practicable” and “not less than 90 days” after the Act’s enactment. § 8, 124 Stat. at 2374. If Congress did not intend the new statutory penalties to apply immediately, this emergency authority would be seriously undermined. *Vera Rojas*, 2011 WL 2623579 at *4; *Douglas*, 2011 WL 2120163 at *4; *Fisher*, 2011 WL 2022959 at *2-3 (Williams, J., dissenting). Almost all crack cocaine offenders sentenced within a few months of the Fair Sentencing Act’s enactment would have committed their crimes prior to the Act’s enactment. See, e.g., Administrative Office of the Courts, Judicial Business of the United States Courts 270-71, tbl. D-10 (2010) (median time from filing to disposition in federal drug cases is 9.7 months). If the “applicable law” in those cases was the repealed statutory penalties, then the Commission’s “conforming” amendments would provide no benefit at all. Moreover, to “conform” with the old statutory penalties, courts would have to apply the old guidelines ranges, which is at odds with § 3553(a)(4)(A)(ii).

This is why both the First and Eleventh Circuits have held that the Fair Sentencing Act applies to those sentenced after its enactment (or at least after November 1, 2010). As the Eleventh Circuit concluded, “[b]y granting the Sentencing Commission the emergency authority to amend the Sentencing Guidelines by November 1, 2010, Congress necessarily indicated its intent for the FSA to apply immediately. To ask district courts to consider the date the offense was committed to determine the statutory minimum, but the date of sentencing to determine the guidelines range, would lead to an incongruous result that is inconsistent with Congressional intent.” *Vera Rojas*, 2011

WL 2623579 at *4. “[S]uch an interpretation of the FSA would run afoul of the policies motivating its enactment and render ineffectual Congress’s express directive to the Sentencing Commission.” *Id.* It “would set the legislative mind at naught by giving effect to the savings statute, and prevent the consistency and conformity that the statute expressly seeks.” *Fisher*, 2011 WL 2022959 at *3 (Williams, J., dissenting) (alterations, citation, and quotations omitted).

As many have recognized, “the new Guidelines cannot be ‘conforming’ and ‘achieve consistency’ (Congress’s express mandate) if they are based upon statutory minimums that cannot be effective to a host of sentences over the next five years until the statute of limitations runs on pre-August 3, 2010 conduct.” *Douglas*, 746 F.Supp.2d at 228. “It would be a strange definition of ‘conforming’ and ‘consistency’ to have these new amended Guidelines go into effect while the old and therefore inconsistent statutory minimums continue.” *Id.* at 229. As the Eleventh Circuit concluded, “Congress could not have intended this result.” *Vera Rojas*, 2011 WL 2623579 at *4.

Moreover, such an outcome would produce absurd results. *Parks*, 2010 WL 5463743 at *7; see also *Vera Rojas*, 2011 WL 2623579 at *4; *Fisher*, 2011 WL 2022959 at *2 (Williams, J., dissenting). If the Fair Sentencing Act does not apply to individuals like Petitioner, high-level crack cocaine dealers will receive sentences similar to low-level dealers because the amended guidelines yield sentences closer to the heightened mandatory minimums. *Id.*; *Gilliam*, 753 F.Supp.2d at 690-91; *English*, 757 F.Supp.2d at 904.

Other aspects of the Fair Sentencing Act confirm Congress’s intent that it apply to

cases like Petitioner's, including its Title and its Preamble, which indicates that the Act's goal was to "restore fairness to Federal cocaine sentencing." *Douglas*, 746 F.Supp.2d at 229. Indeed, the Act was a response to § 841(b)'s now-infamous 100-to-1 ratio between cocaine base and cocaine. *DePierre v. United States*, 131 S.Ct. 2225, 2229 (2011). That ratio primarily applied to punish those who traffic in crack cocaine 100 times harsher than those who traffic in powder cocaine. See United States Sentencing Commission: Report to Congress: Cocaine and Federal Sentencing Policy (2007) (hereinafter Commission Report). Since its inception, this ratio has come under attack, primarily by the United States Sentencing Commission, which repeatedly found that the ratio was "generally unwarranted." *Kimbrough v. United States*, 552 U.S. 85, 97 (2007). In 1985, 1997, 2002, and 2007, the Commission recommended that Congress lower the 100-to-1 ratio, *id.* at 99-100, which it finally did, to an 18-to-1 ratio, in the Fair Sentencing Act.

The 100-to-1 ratio was criticized because crack cocaine and powder cocaine, "two forms of the same drug", are "chemically similar", with the identical active ingredient and "the same physiological and psychotropic effects." *Kimbrough*, 552 U.S. at 94. It is also true that the majority of crack cocaine offenders are Black (81.8% in 2006), while the majority of powder cocaine offenders are Hispanic/White (71.8%). Commission Report at 15-16; *Kimbrough*, 552 U.S. at 98. The legislative history confirms that this racial disparity was a primary reason why Congress passed the Fair Sentencing Act.⁹ And so,

⁹155 Cong. Rec. S10491-S10493 (daily ed. Oct. 15, 2009) (statements of Sen. Durbin, Leahy, & Specter) (a sample of quotes: "the crack/powder disparity disproportionately affects African-Americans"; "When one looks at the racial implications of the crack-powder disparity, it has bred disrespect for our criminal justice system"; "fixing the crack-powder disparity

because a Court must not interpret a statute to undercut its primary objective, *Abbott v. United States*, 131 S.Ct. 18, 27 (2010), and because the Fair Sentencing Act's primary objective was to "restore fairness to Federal cocaine sentencing," any argument "to limit the applicability of the new statute [is] less than compelling." *Gillam*, 753 F.Supp.2d at 690-91.

'would better reduce the [sentencing] gap [between African Americans and whites] than any other single policy change"; the Act "will finally enable us to address the racial imbalance that has resulted from the cocaine sentencing disparity"; "the criminal justice system has unfair and biased cocaine penalties that undermine the Constitution's promise of equal treatment for all Americans"; "this policy has had a significantly disparate impact on racial and ethnic minorities"; "I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does"); 156 Cong. Rec. S1680-S1683 (daily ed. Mar. 17, 2010) (statements of Sen. Durbin & Leahy) (a sample of quotes: "Disproportionately, African-Americans who are addicted use crack cocaine. . . So the net result of this was that the heavy sentencing we enacted years ago took its toll primarily in the African-American community."); "The racial imbalance that has resulted from the cocaine sentencing disparity disparages the Constitution's promise of equal treatment of all Americans."; "These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under law."; quoting John Payton, president of the NAACP Legal Defense Fund, who called the disparity "one of the most notorious symbols of racial discrimination in the modern criminal justice system."; "I believe the Fair Sentencing Act moves us one step closer to reaching the important goal of equal justice for all."); 156 Cong. Rec. H6196-6204 (daily ed. July 28, 2010) (statements of Rep. Scott, Clyburn, Sensenbrenner, Jackson Lee, Lungren, Ellison, Paul, & Hoyer) (a sample of quotes: "This disparity is particularly egregious when you consider that . . . 80 percent of the crack defendants are black, whereas only 30 percent of the powder cocaine defendants are black"; "This is unjust and runs contrary to our fundamental principles of equal protection under the law."); "The unwarranted sentencing disparity . . . disproportionately affects the African-American community." "one of the sad ironies in this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue. When African-Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes."; "It has long been clear that 100-to-1 disparity has had a racial dimension as well, helping to fill our prisons with African Americans disproportionately put behind bars for longer."); 156 Cong. Rec. E1498 (daily ed. July 30, 2010) (statement of Rep. Johnson); 156 Cong. Rec. S6867 (daily ed. Aug. 5, 2010) (statement of Sen. Kaufman); *see also* Parks, 2010 WL 5463743 at *4 (quoting Attorney General Holder).

Section 10 also bolsters the necessary implication that Congress intended the Act to apply immediately. That section orders the Commission to submit a report to Congress within five years detailing the “impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.” 124 Stat. at 2375. This directive makes clear that Congress intended the Act to apply immediately. If Congress expected the repealed statutory minimums to apply until the statute of limitations ran in five years, it would make little sense to order the Commission to issue a report at this five-year mark; clearly, the continued application of the repealed statute would frustrate the Commission’s ability to decipher the full effect of the Fair Sentencing Act.

Finally, the rule of lenity “adds a measure of further support” to Petitioner’s argument. *Douglas*, – F.3d. –, 2011 WL 2120163 at *5. Under this rule, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Skilling v. United States*, 130 S.Ct. 2896, 2932 (2010). “[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing”. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992). It is “rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.” *Id.* (quotations omitted). Of course, the rule “only applies if, after considering text, structure, history, and purpose, there remains a ‘grievous ambiguity or uncertainty in the statute.’” *Barber v. Thomas*, 130 S.Ct. 2499, 2508 (2010). While Petitioner believes that the statute is sufficiently certain in his favor, to the extent this Court thinks otherwise, any ambiguity would be “grievous,” and the rule of

lenity would apply to resolve this issue in Petitioner's favor. *Id.*; *Skilling*, 130 S.Ct. at 2932; *R.L.C.*, 503 U.S. at 305; *Douglas*, – F.3d. –, 2011 WL 2120163 at *5; *Parks*, 2010 WL 5463743 at *6, 8 (invoking rule of lenity on this very issue).

In the end, the First and Eleventh Circuits, two Judges from the Seventh Circuit, over 40 district court judges, and the United States government have found this argument persuasive. The Seventh Circuit erred when it rejected the argument and refused to apply the Fair Sentencing Act to Petitioner's case.

(2) Petitioner does not seek a technical abatement of his conviction.

Below, Petitioner asserted that the general savings statute did not apply in this case because he did not seek a technical abatement of the prosecution. The Seventh Circuit ignored the argument, and no other Court of Appeals has addressed it. The argument is premised on four unassailable propositions, as discussed above: (1) Congress enacted the general savings statute "to obviate mere technical abatement", *Hamm*, 379 U.S. at 314; (2) the general savings statute is in derogation of the common law, *Bonjorno*, 494 U.S. at 841 n.1 (Scalia, J., concurring); (3) because it is in derogation of the common law, it must be strictly construed, *Pasquantino*, 544 U.S. at 359; and (4) Petitioner does not seek technical abatement of his conviction, but rather the application of a new law.

From these premises, this conclusion follows: the general savings statute has no application to this case. Petitioner does not seek technical abatement, and the general savings statute, which is in derogation of the common law, only exists to preclude technical abatements. A strict construction of the statute means that it applies only in

cases where the defendant has asked the court to dismiss the charges. Accordingly, the Seventh Circuit's decision in this case is in error.

(3) The Act did not "release or extinguish" any penalty, but rather remedied an unfair definition in § 841(b).

Both before and after the Fair Sentencing Act's enactment, § 841(b)'s mandatory minimum penalty provisions remain unchanged. 21 U.S.C. § 841(b); 124 Stat. 2372. Thus, as a practical matter, the Act did not "extinguish or release" any punishment provided for in § 841(b). *See United States v. Kolter*, 849 F.2d 541, 544 (11th Cir. 1988); *but see Martin v. United States*, 989 F.2d 271 (8th Cir. 1993). "It does not wipe clean the defendant's penal obligation." *United States v. Stephens*, 449 F.2d 103, 106 (9th Cir. 1971). Rather, the Fair Sentencing Act altered the quantity of crack cocaine necessary to trigger § 841(b)'s penalty provisions. 124 Stat. at 2372. In doing so, the Act "merely altered the class of persons" subject to those penalties. *Kolter*, 849 F.2d at 544. By providing steeper penalties for greater drug quantities, Congress intended to punish major drug traffickers more harshly than minor drug traffickers.¹⁰ As such, the Act simply redefines "serious" and "major" drug traffickers in the crack cocaine context because the former

¹⁰See, e.g., 156 Cong. Rec. H6199 (statement of Rep. Jackson Lee) (noting that statistics confirmed that the then-mandatory minimum sentences "sweep in low-level crack cocaine users and dealers" and "diverts federal resources from high-level drug traffickers," and citing HR 265's findings that "One of the principal objectives of the Anti-Drug Abuse Act of 1986, which established different drug quantities, which were intended to serve as proxies for identifying offenders who were 'serious' traffickers . . . and 'major' traffickers"); 156 Cong. Rec. S1683 (statement of Sen. Leahy) ("The primary goal underlying the crack sentence structure was to punish the major traffickers and drug kingpins who were bringing crack in to our neighborhoods."); Moreover, Section 4 of the Fair Sentencing Act is entitled, "Increased Penalties for Major Drug Traffickers."

statute's definitions were flawed.

In *Kolter*, the Eleventh Circuit reversed the defendant's conviction for unlawful possession of a firearm in light of an amendment to the statute. 849 F.2d at 542. The amendment redefined the term "convicted felon," and the defendant did not fall under the new definition. *Id.* at 542-43. "[E]ven if [the new statute] had repealed a statute, § 109 would not apply as the redefinition of 'convicted felon' did not 'release or extinguish any penalty, forfeiture, or liability.'" *Id.* at 544. If a new definition of "convicted felon" does not extinguish or release a penalty, then a new definition of serious and major drug traffickers does not extinguish or release a penalty either.

But even absent *Kolter*, this Court has never applied the general savings statute in a situation where an amended statute did not alter the penalty provisions. *See, e.g., Pipefitters Local*, 407 U.S. at 433; *Reisinger*, 128 U.S. at 401-02. Again, the general savings statute must be strictly construed, *Pasquantino*, 544 U.S. at 359, and a strict construction of the terms "release or extinguish" does not extend to the Fair Sentencing Act's amendment of the quantity of crack cocaine necessary to trigger the penalty provisions in § 841(b). Such an amendment does not liberate, discharge, or set free from restraint or confinement, Black's Law Dictionary 1159 (5th Ed. 1979) (definition of "release"), nor does it bring or put an end to, terminate, or cancel the relevant penalties, *Id.* at 525 (definition of "extinguish").

The amendment redefined serious and major crack cocaine traffickers; it did not release major, or even minor, crack cocaine traffickers from § 841(b)'s penalties. It is still

illegal to traffic crack cocaine, and those who do so are still subject to punishment if convicted in federal court. 21 U.S.C. § 841(b). The Fair Sentencing Act did not amend the punishment portion of 21 U.S.C. § 841. The punishments remain the same. Accordingly, the general savings statute has no application in this case.

This logic finds support in this Court's decisions on "matters of remedy and procedure." *Bridges*, 346 U.S. at 227 n.25. In such matters, the general savings statute has no application. *Id.* For instance, in *Bridges*, this Court dismissed an indictment on statute of limitations grounds after refusing to apply the general savings statute to save a former statute's lengthier limitations period. *Bridges*, 346 U.S. at 227.

And so, the Fair Sentencing Act has not released or extinguished a penalty, but rather has remedied a flawed definition. That remedy seeks to punish major drug traffickers similarly, regardless of the type of drug trafficked. Because the prior law failed in this regard with respect to one drug type, cocaine base, the Fair Sentencing Act concerns a matter of procedure or remedy and does not "release or extinguish" a penalty, and, therefore, the general savings statute has no application to this case.

Bridges, 346 U.S. at 227 n.25; *see also Bruner v. United States*, 343 U.S. 112, 117 (1952) (general savings statute held inapplicable because "Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Ex parte Collett*, 337 U.S. 55, 71 (1949) (amended venue provisions applied to cases pending on appeal because they remedied the prior statute's absence of *forum non*

coveniens); *Obermeier*, 186 F.2d at 253 (statute-of-limitations case); *United States v. Mecham*, 509 F.2d 1193 (10th Cir. 1975) (jurisdiction-shifting amendment); *United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir. 1977) (same).

(4) Because Petitioner was sentenced after the Act's enactment, he did not incur a penalty under the old provision.

By its own terms, the general savings statute operates to save a penalty "incurred" under a repealed statute. 1 U.S.C. § 109. Below, Petitioner asserted that he did not incur a penalty under the Fair Sentencing Act because the Act's relevant retroactivity event was the imposition of sentence, and Petitioner was sentenced after the Act's enactment. At least one district court judge has found this argument persuasive. *Holloman*, 765 F.Supp.2d at 1090-91. The Seventh Circuit, however, rejected the argument without discussion, summarily concluding that "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing," and that the Act, therefore, did not apply "retroactively" to Petitioner's case. *Fisher*, 635 F.3d at 340.

Under either of this Court's tests for retroactivity, a "vested rights" approach or a "temporal application" approach, the application of the Fair Sentencing Act to individuals, like Petitioner, who were sentenced after the Act's enactment is not a retroactive exercise; it is a prospective exercise. *Holloman*, 765 F.Supp.2d at 1090-91. After all, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269.

Under a “vested rights” approach, a statute operates retroactively only if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Id.* at 268. This test derives from this Court’s *Ex Post Facto Clause* jurisprudence, *Id.* at 290 (Scalia, J. concurring), and its aim is to alleviate “the unfairness of imposing new burdens on persons after the fact,” *Id.* at 270. A statute that “merely remove[s] a burden on private rights by repealing a penal provision” is not a retroactive statute. *Id.* Because that is essentially what the Fair Sentencing Act does, it does not fall within the definition of a retroactive statute. *Id.* at 270, 280.

This conclusion also follows if one looks at the “temporal application” of the Fair Sentencing Act. See, e.g., *Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring). The critical issue posed under this theory is:

what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event.

Id. For instance, “a new rule of evidence governing expert testimony . . . is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony.” *Id.* Or, “[i]f attorney’s fees can be awarded in a suit involving conduct that antedated the fee-authorizing statute, it is because the purpose of the fee award is not to affect that conduct, but to encourage suit for the vindication of certain rights so that the retroactivity event is the filing of suit.” *Id.* at 292. With respect

to jurisdiction-conferring statutes, the relevant event for retroactivity purposes is the moment at which jurisdiction is sought to be exercised. *Id.* With respect to an injunction, because it operates in the future, "the relevant time for judging its retroactivity is the very moment at which it is ordered." *Id.* at 293.

In *Martin v. Hadix*, this Court held that a section of the Prison Litigation and Reform Act that places limits on attorney's fees for postjudgment monitoring only limited such fees with respect to services performed after the statute's effective date. 527 U.S. 343, 361-62 (1999). "[T]he relevant retroactivity event [was] the doing of the work for which the incentive was offered." *Id.* at 364 (Scalia, J. concurring). In *Rep. of Austria v. Altmann*, this Court held that the Foreign Services Intelligence Act applied to claims that were based on conduct that preceded the enactment of the Act because the claims, rather than the underlying conduct initiating the claims, were "the relevant conduct regulated by the Act." 541 U.S. 677, 681, 697 n.17, 697-98 (2004).

As applied in this case, the relevant retroactivity event is the imposition of sentence, as the Fair Sentencing Act obviously regulates sentencing. *Holloman*, 765 F.Supp.2d at 1090-91; *Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring). Indeed, as relevant here, the Act amended the quantity of crack cocaine necessary to trigger the mandatory minimums set forth in 21 U.S.C. § 841, and drug type and quantity are not elements of the offense. See, e.g., *United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002). Rather, they are sentencing factors. *Id.* Thus, because drug quantity, for mandatory minimum purposes, is a sentencing factor and not an element of the offense, the relevant

retroactivity event in this case must be the date of sentencing, not the date of the offense conduct. *Holloman*, 765 F.Supp.2d at 1090-91; see also *Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring). The relevant retroactivity event is the imposition of sentence because only then does drug quantity, a sentencing factor, control for purposes of the mandatory minimum. See *id.*; *Hadix*, 527 U.S. at 364 (Scalia, J. concurring); *Altmann*, 541 U.S. at 681, 697-98. "When the FSA changed the applicability of mandatory minimum sentences, it did not alter the penalty for committing the offense. A mandatory minimum merely cabins the discretion of the sentencing judge." *Holloman*, 765 F.Supp.2d at 1090-91. "Therefore, the relevant retroactivity event is the sentencing date, not the date the offense was committed . . ." *Id.* at 1091.

In the end, under either a "vested rights" approach or a "temporal application" approach, the application of the Fair Sentencing Act to individuals, like Petitioner, who were sentenced after the Act's enactment is not a retroactive exercise. Rather, it is prospective, and a prospective application of a statute avoids any need to refer to the general savings statute because no penalty is incurred under a repealed statute when current law is applied prospectively. *Id.* Because the Fair Sentencing Act was current law at the time Petitioner was sentenced, it applied to his case.

(5) The Fair Sentencing Act's purpose—to right a racially discriminatory wrong—precludes the general savings statute's application.

Finally, the general savings statute does not apply to save a repealed statute when that statute undermines important public policy. *Hamm*, 379 U.S. at 313-16. Rather, courts apply new legislation "to avoid inflicting punishment at a time when it can no

longer further any legislative purpose, and would be unnecessarily vindictive.” *Id.* at 313. Indeed, “the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one.” *Landgraf*, 511 U.S. at 276 n.30. And so, when the Twenty-First Amendment repealed the Eighteenth Amendment, prosecutions under the National Prohibition Act “immediately fell with the withdrawal by the people of the essential constitutional support.” *Chambers*, 291 U.S. at 222.

The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment . . . would involve an attempt to continue the application of the statutory provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect.

Id. at 222-23.

While *Chambers* was of constitutional magnitude, this Court extended its reasoning to the statutory realm in *Hamm*. There, the Court held that state convictions for trespass, based on sit-in demonstrations at segregated lunch counters, abated with the passage of the Civil Rights Act of 1964. 379 U.S. at 307-08.

The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to the enactment of the Act, the still-pending convictions are abated by its passage.

Id. at 308. This Court refused to save the convictions under the general savings statute because the Civil Rights Act “substitutes a right for a crime. So drastic a change is well beyond the narrow language of amendment and repeal.” *Id.* at 314. In so holding, this Court relied on the “great purpose of the civil rights legislation”, which “was to

obliterate the effect of a distressing chapter of our history" (i.e., racial segregation). Because there was "no public interest to be served in the further prosecution of the petitioners," the Court vacated the convictions and dismissed the charges. *Id.* at 317.

The Fair Sentencing Act has not substituted a right for a crime, and so the specific holdings in *Chambers* and *Hamm* are not dispositive in this appeal. Yet, these cases certainly provide a measure of support for Petitioner's argument. *Douglas*, – F.3d. –, 2011 WL 2120163 at *4. Indeed, the principles underlying those specific holdings are dispositive in this appeal, especially those in *Hamm*. As discussed above, it is beyond dispute that Congress enacted the Fair Sentencing Act primarily to redress a racially discriminatory disparity between the treatment of crack and powder cocaine. Indeed, a number of lawmakers referred to the disparity in terms of an Equal Protection violation. (See n.9, *supra*). The President of the NAACP's Legal Defense Fund is quoted as describing the disparity as "one of the most notorious symbols of racial discrimination in the modern criminal justice system." 156 Cong. Rec. S1683. Thus, the same underlying principle that led to the enactment of the Civil Rights Act of 1964—the eradication of racial discrimination— also led to the passage of the Fair Sentencing Act.

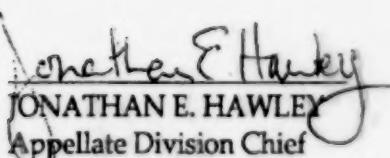
It is of course true that trafficking in crack cocaine is not an act of civil disobedience, and Petitioner realizes that his conduct is much different than that of the civil rights protesters in *Hamm*. That is why Petitioner does not seek abatement of his conviction. His actions are as illegal today as they were a year ago. But that does not mean that he should have been sentenced under an unfair and already-repealed law that

discriminates on the basis of race. This is especially true when that now-repealed law admittedly had no evidentiary basis, 156 Cong. Rec. H6202 (statement of Rep. Lungren), and was founded on since-discredited assumptions, 155 Cong. Rec. S10491 (statement of Sen. Durbin); *Kimbrough*, 552 U.S. at 97-98. When a statute is repealed or amended because it discriminates on the basis of race, the general savings statute should not save that statute. *Hamm*, 379 U.S. at 314-16. To hold otherwise would be "unnecessarily vindictive." *Hamm*, 379 U.S. at 313. It would mistakenly save a statute since "deprived of force." *Chambers*, 291 U.S. at 222.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the published decision of the United States Court of Appeals for the Seventh Circuit, affirming the Petitioner's conviction and sentence.

Respectfully submitted,
EDWARD DORSEY SR., Petitioner


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Dated: August 1, 2011

APPENDIX A

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 (Cite as: 635 F.3d 336)

► United States Court of Appeals,
 Seventh Circuit.
UNITED STATES of America, Plaintiff–Appellee,
 v.
Anthony FISHER, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
 v.
Edward Dorsey, Sr., Defendant–Appellant.
 Nos. 10-2352, 10-3124.
 Argued Feb. 15, 2011.
 Decided March 11, 2011.

Background: Defendant was convicted upon his plea of guilty in the United States District Court for the Eastern District of Wisconsin, Lynn Adelman, J., of conspiracy to distribute crack, and he appealed. Second defendant was convicted upon his plea of guilty in the United States District Court for the Central District of Illinois, Michael P. McCuskey, Chief Judge, of possessing crack cocaine with intent to distribute, and he appealed.

Holdings: The Court of Appeals, Evans, Circuit Judge, held that:

- (1) Fair Sentencing Act (FSA) did not apply retroactively, and
- (2) relevant date for determining whether FSA applied was date defendant engaged in underlying criminal conduct, rather than date defendant was sentenced.

Affirmed.

West Headnotes

[1] Sentencing and Punishment 350H ▶ 16

350H Sentencing and Punishment
 350HI Punishment in General
 350HI(A) In General
 350Hk13 Retroactive Operation
 350Hk16 k. Particular statutes. Most Cited Cases

Cited Cases

General federal savings statute applied to bar retroactive application of Fair Sentencing Act (FSA), which increased drug quantities necessary to trigger mandatory minimum sentences under Controlled Substances Act and Controlled Substances Import and Export Act, and thus FSA did not apply to defendant who was convicted of conspiracy to distribute crack cocaine prior to enactment of FSA, even though defendant's appeal was pending on date FSA went into effect, absent any indication from Congress that FSA operated retroactively. Fair Sentencing Act of 2010, § 4(a), 21 U.S.C.A. § 841(b)(1)(B)(iii); 1 U.S.C.A. § 109.

[2] Sentencing and Punishment 350H ▶ 16

350H Sentencing and Punishment

350HI Punishment in General

350HI(A) In General

350Hk13 Retroactive Operation

350Hk16 k. Particular statutes. Most Cited Cases

Relevant date for determining whether Fair Sentencing Act (FSA) applied was date defendant engaged in underlying criminal conduct, rather than date defendant was sentenced, and thus FSA did not apply to defendant who possessed crack cocaine with intent to distribute on date prior to enactment of FSA, even though defendant was sentenced after enactment of FSA, absent any indication from Congress that FSA retroactively applied to not-yet-sentenced defendants. Fair Sentencing Act of 2010, § 4(a), 21 U.S.C.A. § 841(b)(1)(B)(iii); 1 U.S.C.A. § 109.

[3] Statutes 361 ▶ 216

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k216 k. Motives and opinions of legislators. Most Cited Cases

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Although Court of Appeals may look for statements of legislative history which can plausibly be read as reflecting any general agreement, for purposes of statutory interpretation, cherry-picked statements made by proponents of the legislation cannot be relied upon as indications of the will of Congress.

[4] Constitutional Law 92 C=2507(3)

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

92k2499 Particular Issues and Applications

92k2507 Criminal Law

92k2507(3) k. Sentencing and punishment. Most Cited Cases

Punishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds.

*337 Jonathan H. Koenig (argued), Attorney, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee in No. 10-2352.

Daniel T. Hansmeier (argued), Attorney, Office of the Federal Public Defender, Springfield, IL, Richard H. Parsons, Attorney, Office of the Federal Public Defender, Peoria, IL, for Defendant-Appellant in No. 10-2352.

Anthony Fisher, Oklahoma City, OK, Pro Se.

Jonathan H. Koenig (argued), Attorney, Office of the United States Attorney, Milwaukee, WI, Joseph H. Hartzler, Attorney, Office of the United States Attorney, Springfield, IL, for Plaintiff-Appellee in No. 10-3124.

Daniel T. Hansmeier (argued), Attorney, Office of the Federal Public Defender, Springfield, IL, John C. Taylor, Attorney, William C. Zukosky, Attorney, Office of *338 the Federal Public Defender, Urbana, IL, for Defendant-Appellant in No. 10-3124.

Edward Dorsey, Sr., Pekin, IL, Pro Se.

Before ROVNER, WOOD, and EVANS, Circuit Judges.

EVANS, Circuit Judge.

The Fair Sentencing Act of 2010 (FSA) might benefit from a slight name change: The Not Quite as Fair as it could be Sentencing Act of 2010 (NQFSA) would be a bit more descriptive. But whether the FSA should be amended to more closely resemble its name is a matter for Congress. We can do nothing about it at this time.

The FSA increased the drug quantities necessary to trigger mandatory minimum sentences under the Controlled Substances Act and the Controlled Substances Import and Export Act. Prior to the effective date (August 3, 2010) of the FSA, the amount of cocaine necessary to bring the mandatory minimum sentences into play was based on what is now viewed as the flawed 100:1 ratio of crack vs. powder cocaine. For crack cocaine, the FSA increased the amount from 5 to 28 grams for activating the five-year mandatory minimum term. For the ten-year mandatory minimum, the threshold amount jumped from 50 to 280 grams. But the problem, from the point of view of the two defendants in this case, is that the FSA is not retroactive. It applies only to defendants who are sentenced based on conduct that took place after August 3, 2010.

[1] Anthony Fisher pled guilty in Wisconsin, in February 2010, to one count of conspiracy to distribute crack. A presentence report stated that he was responsible for between 150 and 500 grams of crack. It recommended a 140 to 175 months guideline range. Fisher disputed this, claiming he was responsible for only 50 to 150 grams of crack and the proper guideline range was 120 to 150 months. The district judge declined to resolve the quantity dispute and sentenced Fisher to the 120-month mandatory minimum based on 50 or

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more grams of crack. Judgment was entered on June 2, 2010. Fisher filed a notice of appeal the next day.

Fisher claims that the FSA should apply because his appeal was pending on August 3, 2010, when the Act went into effect. Fisher asks us to apply the FSA retroactively to his sentence. However, as he acknowledged at oral argument, his case falls squarely within the ambit of our recent opinion in *United States v. Bell*, 624 F.3d 803 (7th Cir.2010). In *Bell*, we were also dealing with a defendant who had been convicted and sentenced and had an appeal pending when the FSA went into effect. We found that the general federal savings statute, 1 U.S.C. § 109, applies to the FSA and prevents it from operating retroactively. 624 F.3d at 815.

Fisher asks us to rethink *Bell*. However, he makes this suggestion based not on case law, but on his own suggested interpretations of the FSA and the application of the savings statute thereto. We are not persuaded and decline to stray from our recent precedent in *Bell*. We further note that our sister circuits have likewise found that the savings statute bars retroactive application of the FSA. See *United States v. Gomes*, 621 F.3d 1343, 1346 (11th Cir.2010); *United States v. Carradine*, 621 F.3d 575, 580 (6th Cir.2010).

[2] The appeal of our other defendant, Edward Dorsey, presents a slight wrinkle because he was sentenced after the FSA went into effect. On June 3, 2010, Dorsey pled guilty to possessing 5.5 grams of crack cocaine with intent to distribute, in Kankakee, Illinois, on August 6, 2008. Because he had a prior felony drug conviction,*339 the mandatory minimum 10-year term was in play. Under the FSA, however, Dorsey would have had to possess at least 28 grams of crack in addition to the prior felony drug conviction to trigger the 10-year mandatory minimum. Dorsey was sentenced on September 10, 2010. At sentencing, the district judge declined to apply the FSA to Dorsey's case, saying, "in this case the crime that you pled guilty to was ... two years before the President signed the legisla-

tion." Dorsey was sentenced to 120 months.

Dorsey argues that, even if the savings statute prevents retroactive application of the FSA, the relevant date for a retroactivity analysis is the date of sentencing, not the date of the commission of the criminal act, and therefore the FSA should have applied to him. Dorsey suggests that, in keeping with congressional intent and for reasons of fairness, we should distinguish someone in his situation from that of the defendant in *Bell*, and apply the FSA to all defendants sentenced after August 3, 2010.

In *Bell* we held that the savings statute prevents the FSA from "operating retroactively absent any indication from Congress. And since the FSA does not contain as much as a hint that Congress intended it to apply retroactively," we declined to apply it to Mr. Bell. 624 F.3d at 815. But Dorsey argues, rather creatively, that when considering applicability of a savings statute, we will apply the statute and deny retroactivity unless Congress suggests otherwise either by "express declaration or necessary implication." *Great Northern Railway Co. v. United States*, 208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908). Dorsey then suggests that, although there is no express declaration here, there is necessary implication that the FSA must be applied retroactively—at least as to sentences imposed after August 3, 2010, regardless of when the criminal conduct took place.

Specifically, Dorsey points to the fact that the FSA expressly urged the Sentencing Commission to amend the guidelines on an emergency basis, and required the amendments to be adopted by November 1, 2010. He argues that this is evidence of the implicit will of Congress that the FSA be as speedily and widely implemented as possible. Further, he points to statements of various legislators urging the adoption of the FSA as the means to correct the long-standing unfairness in crack cocaine sentences, and urging the application of the FSA to all defendants who had not been sentenced as of passage of the FSA, regardless of whether their criminal conduct occurred before this date.

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[3] In weighing this as potential evidence of a necessary implication that Congress wanted the FSA to be applied retroactively, we are mindful of the pitfalls of relying on legislative history. Although we may look for statements which can "plausibly be read as reflecting any general agreement," *Landgraf v. USI Film Products*, 511 U.S. 244, 262, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), cherry-picked statements made by proponents of the legislation cannot be relied upon as indications of the will of Congress.

Debate surrounding the crack cocaine sentencing scheme and the infamous "100:1 ratio" has been raging for years, and there is strong rhetoric to be found on either side. The FSA is compromise legislation and must be viewed as such. Given the long-standing debate surrounding, and high-level congressional awareness of, this issue, we hesitate to read in by implication anything not obvious in the text of the FSA. We believe that if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have *340 at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the Sentencing Commission. In other words, if Congress wanted retroactive application of the FSA, it would have said so.

Given the absence of any direct statement or necessary implication to the contrary, we reaffirm our finding that the FSA does not apply retroactively, and further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing.

[4] We have sympathy for the two defendants here, who lost on a temporal roll of the cosmic dice and were sentenced under a structure which has now been recognized as unfair. However, "[p]unishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds." *Warden, Lewisburg Penitentiary v. Mar-*

revo, 417 U.S. 653, 664, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974).

We close with one final observation. Because crack cocaine quantity is viewed as a sentencing factor rather than a charged element of the offense, it is possible that a defendant could be convicted for conduct taking place both before and after August 3, 2010. Were this the case, any conduct committed after August 3, 2010 would necessarily be considered within the confines of the FSA. But Dorsey's sentence was based entirely on conduct that occurred two years prior to August 3, 2010. He can, therefore, not get the kind of relief that may be available to a defendant whose criminal conduct straddles August 3, 2010. A future defendant in that situation may very well be able to benefit, at least in part, from the FSA.

For these reasons, the judgments as to Fisher and Dorsey are AFFIRMED.

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APPENDIX B

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Only the Westlaw citation is currently available.

United States Court of Appeals,
 Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
 v.

Anthony FISHER, Defendant-Appellant.

United States of America, Plaintiff-Appellee,
 v.

Edward Dorsey, Sr., Defendant-Appellant.

Nos. 10-2352, 10-3124.

May 25, 2011.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:08-cr-00161—Lynn Adelman, Judge.

Appeal from the United States District Court for the Central District of Illinois. No. 2:09-cr-20003—Michael P. McCuskey, Chief Judge.

Jonathan H. Koenig, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee.

Richard H. Parsons, Office of the Federal Public Defender, Peoria, IL, for Defendant-Appellant.

Anthony Fisher, Oklahoma City, OK, pro se.

Before ROVNER, WOOD, and EVANS, Circuit Judges.

PER CURIAM.

*1 On March 23, 2011, the defendants-appellants Anthony Fisher (# 10-2352) and Edward Dorsey (# 10-3124) filed petitions for rehearing and rehearing en banc. The panel has voted to deny the petitions for rehearing. On April 5, 2011, an order was issued directing the government to file an answer to the petition for rehearing en banc filed by Edward Dorsey. The answer was filed on April 19, 2011. Subsequently, a vote was taken on the petition for rehearing en banc in appeal # 10-3124.

Chief Judge Easterbrook and Circuit Judges Posner, Flaum, Kanne, Rovner, Wood, Sykes and Tinder voted to deny the petition. Circuit Judges Williams and Hamilton voted to grant the petition.

Therefore, the petitions for rehearing and rehearing en banc filed on March 23, 2011 are denied.

WILLIAMS, Circuit Judge, with whom HAMILTON, Circuit Judge, joins, dissenting from the denial of rehearing en banc.

Edward Dorsey pled guilty to distribution of 5.5 grams of crack cocaine for conduct that occurred prior to the passage of the Fair Sentencing Act of 2010 ("FSA"). He was sentenced on September 10, 2010, after its enactment. The panel found that under the General Saving Statute, 1 U.S.C. § 109, the FSA was not "retroactive" to those whose sentences were pending at the time of the FSA's enactment, and that the relevant date for application of the FSA is the date of conduct. *United States v. Fisher*, 635 F.3d 336, 340 (7th Cir. 2011). Like many of the district courts currently addressing this issue around the country, I would find that the General Saving Statute cannot be read to preclude the application of the FSA to individuals in Dorsey's position.

We are the first circuit to address the question of whether individuals sentenced *after* the enactment of the FSA are entitled to the benefit of the statute. Given the five-year statute of limitations for offenses such as the one at issue, *see* 18 U.S.C. § 3282, adhering to a flawed view concerning the application of the General Saving Statute will require the district courts to continue administering sentences that have been acknowledged by Congress as unjust. While the number of people indicted for preFSA conduct will diminish over time, in fiscal year 2010, at least 78.8% of defendants sentenced for crack-cocaine offenses were sentenced for conduct involving five grams or more of the drug. United States Sentencing Commission 2010

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Sourcebook of Federal Sentencing Statistics Tab 43.

I.

The General Saving Statute provides that “[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide.” 1 U.S.C. § 109. The Supreme Court has said that the saving statute “cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment.” *Great No. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). In other words, where there is a “specific directive” that “can be said by fair implication or expressly to conflict with § 109,” “there [would] be reason to hold that [the new statute] superseded § 109.” *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n. 10 (1974) (citing *Great No. Ry. Co.*, 208 U.S. at 465–66). The General Saving Statute does not apply in instances where, by “necessary implication, arising from the terms of the law as a whole,” it is clear that “the legislative mind will be set at naught by giving effect to the [saving statute].” *Great No. Ry. Co.*, 208 U.S. at 465; see also *Hertz v. Woodman*, 218 U.S. 205, 217 (1910) (stating that the General Saving Statute is a “rule of construction … to be read and construed as part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress”). “A subsequent Congress … may exempt itself from such requirements by ‘fair implication’—that is, without an express statement.” *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (emphasis in original) (citing *Marrero*, 417 U.S. at 659–60 n. 10; *Hertz*, 218 U.S. at 218)).

*2 There is no need to “cherry pick,” as the panel’s opinion suggests, from the legislative history to find the necessary directive here since it is found in the language of the FSA itself. In section 8 of the FSA, Congress directed the United States Sentencing Commission (“USSC”) to exercise “emergency authority,” and stated that the USSC

“shall … promulgate the guidelines, policy statements, or amendments provided in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act … and … make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.” 124 Stat. 2372, 2374 (2010). The USSC followed this directive and promulgated a temporary, emergency amendment to the sentencing guidelines consistent with the FSA on November 1, 2010, which became applicable to all defendants sentenced after that date, regardless of when they committed their crimes. See 18 U.S.C. § 3553(a)(4)(A)(ii) (stating that except in cases of remand, sentencing courts are to apply the guidelines “in effect on the date the defendant is sentenced”). Many district courts have found that this statutory directive is sufficient indication of Congress’s intent to have the FSA apply to those individuals yet to be sentenced. See, e.g., *United States v. Watts*, —F.Supp.2d —, 2011 WL 1282542, at *11 (D.Mass.2011) (collecting cases); see also *United States v. Douglas*, 746 F.Supp.2d 220 (D.Me.2010).

The panel recognized this argument, but then stated that Congress “could have dropped a hint” that it sought to apply the FSA to pending cases “in its charge to the Sentencing Commission.” I see no hint that Congress intended otherwise. In that very charge, in fact, Congress ordered the USSC to exercise emergency powers to conform the guidelines to the FSA “as soon as practicable,” and no later than ninety days, instead of waiting for the Commission to promulgate new guidelines under existing procedures.¹⁰¹ When the FSA was enacted, Congress was undoubtedly aware of the default rule of applying amended guidelines to pending cases, which would require the application of a new 18:1 guideline ratio regardless of when the violation occurred. Section 8 of the FSA sought to promote “consistency” between the guidelines and the statute, which signals an intent to apply the FSA to pending cases just as the guidelines would be. Un-

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der the panel's interpretation, for many defendants currently being sentenced whose conduct occurred before the FSA was enacted, the sentencing court would calculate an 18:1 guideline ratio, but would have to apply a statutory 100:1 ratio. Oddly, under the panel's interpretation, of these defendants, the only ones who benefit from this "emergency authority" are the worst offenders, whose new guidelines range would be reduced to the statutory minimum. Congress's mandate in section 8 would not have made much sense if Congress did not intend the FSA to apply to defendants in Dorsey's situation because, regardless of what the Commission promulgated, the new guidelines would simply look to the old statutory minimums.

FN1. The emergency amendments expire on November 1, 2011. 28 U.S.C. § 994(p); *Douglas*, 746 F.Supp.2d at 223 n. 17. On April 28, 2011, the Commission submitted to Congress amendments to the sentencing guidelines and official commentary, which became effective on November 1, 2011, unless Congress acts to the contrary. See 76 Fed.Reg. 24960 (May 3, 2011).

*3 The panel did not explain why section 8 does not provide a "fair implication" under the Supreme Court's elaboration of what is required to supersede the General Saving Statute. Some district courts have, however, attempted to narrow the "fair implication" or "necessary implication" language that finds its origins in *Great Northern*. See *United States v. Young*, —F.Supp.2d —, 2011 WL 1042264, at *4 (E.D.Mich.2011); see also *United States v. Santana*, — F.Supp.2d —, 2011 WL 260744, at *20 n. 23 (S.D.N.Y.2011). Contrary to what these courts have found, *Great Northern* does not stand for the proposition that a "direct contradiction" in the statute itself is required to find the fair or necessary implication sufficient to overcome the General Saving Statute.

In *Great Northern*, the Supreme Court held that certain language in the 1906 Hepburn Law repealing an older statute did not "expressly or by fair im-

plication, conflict with the general rule established by [the General Saving Statute]," 208 U.S. at 466, such that new prosecutions for old conduct were barred, because the language at issue did not touch upon new prosecutions.^{FN2} The court's view was "fortified" by a direct conflict between another provision of the Hepburn Law and the defendants' contention that new prosecutions for pre-1906 conduct were abrogated by the new statute. *Id.* at 468. In other words, the defendants' contention that prosecutions under the old law were abated by the Hepburn Law was directly contradicted by another provision of that same law. In contrast, in this case, there is no "other" provision of the FSA that directly contradicts with Dorsey's position or warrants reading the FSA to prevent application of its terms to individuals yet to be sentenced. *Great Northern* simply does not support a narrowing of the "fair implication" language used by the Court. In fact, as noted above, the Supreme Court cases decided after *Great Northern* have continued to rely upon the "necessary" or "fair implication" language without mentioning the need for a "direct contradiction." See *Marrero*, 417 U.S. at 659 n. 10 ("But only if § 1103(a) can be said by fair implication or expressly to conflict with § 109 would there be reason to hold that § 1103(a) superseded § 109."); *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring) ("A subsequent Congress ... may exempt itself from such requirements by 'fair implication'—that is, without an express statement."). Furthermore, there is no indication that the "fair implication" analysis in *Great Northern* ought to be limited to statutes with their own saving provisions.

FN2. The Hepburn Law itself contained a saving provision stating that "all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law." *Great Northern*, 208 U.S. at 465.

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There is, therefore, little rationale for limiting the "fair implication" language found in *Great Northern*, and none for not considering section 8 of the FSA to be such an implication. The panel's reading of section 8 would set "the legislative mind ... at naught by giving effect to the [saving statute]," *Great No. Ry. Co.*, 208 U.S. at 465, and prevent the consistency and conformity that the statute expressly seeks. As one district judge has noted, "[i]t is only by covering his eyes and plugging his ears that any fairminded person could avoid the conclusion that Congress intended, by 'fair implication,' to treat the statutory amendments ... the same way it directed the Guidelines to be treated, that is, to mandate that the amended statutes be applied to all defendants coming before federal courts for sentencing." *Watts*, 2011 WL 1282542, at *14; see also *Douglas*, 746 F.Supp.2d 220. I would therefore find that the Fair Sentencing Act is applicable to Dorsey as a result of section 8.

II.

*4 Dorsey also argued that a defendant in his position "incurs" a penalty at the time of his sentencing, and not at the time of conduct, such that the Saving Statute would not even apply to the case at hand. I believe this issue warrants review by the full court.

Section 841's elements are contained in subsection (a), while subsection (b) contains the considerations which determine the maximum and minimum sentence. 21 U.S.C. § 841; *United States v. Bjorkman*, 270 F.3d 482, 490 (7th Cir.2001). We have consistently held that in the § 841 context, "drug type and quantity are not elements of the offense"; rather, they are factors to be considered at sentencing. *Bjorkman*, 270 F.3d at 490 (rejecting argument after *Apprendi* that drug quantity is an element of the offense); *United States v. Gougis*, 432 F.3d 735, 745 (7th Cir.2005); *United States v. Martinez*, 301 F.3d 860, 865 (7th Cir.2002). "[A] statute that sets a mandatory minimum neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate pen-

alty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range available to it." *United States v. Krieger*, 628 F.3d 857, 863 (7th Cir.2010) (quotation marks omitted); see also *Harris v. United States*, 536 U.S. 545, 567 (2002) (sentencing factor that triggers mandatory minimum merely limits the court's discretion in selecting penalty within statutory permissible range).

Under the panel's view, an individual could plead guilty to, or be convicted of, distribution of crack cocaine under § 841(a) for conduct occurring prior to August 2010, with no weight specified, but be subject to a statutory five-year mandatory minimum if the government proved at a later sentencing, by a preponderance of the evidence, that the weight of drugs involved in the charged conduct amounted to five grams, or ten years if the weight was shown to be fifty grams. See, e.g., *United States v. Rodriguez*, 67 F.3d 1312, 1324 (7th Cir.1995). The panel does not discuss the legal implications of this result. It only suggests that if a conviction is based on charged conduct that occurred both before and after the enactment date, the post-enactment conduct would have to be considered in light of the FSA. *Fisher*, 635 F.3d at 340. This, however, does not address why the penalty is "incurred" at the time of the commission of the charged offense under the statute, when that mandatory five or ten-year penalty can be based on evidence submitted solely at sentencing.^{FN3}

FN3. In *United States v. Jackson*, 835 F.2d 1195 (7th Cir.1987), we upheld the life sentence of a defendant under 18 U.S.C. § 1202, which prohibited possession of weapons by career criminals, even though he had been sentenced after that statute's repeal by 18 U.S.C. §§ 922(g) and 924(e)(1). However, at that time, we held that the General Saving Statute applied because the latter legislation "simply altered the elements of the offense," *id.* at 1197 (emphasis added), and did not consider

--- F.3d ---, 2011 WL 2022959 (C.A.7 (Ill.))
 (Cite as: 2011 WL 2022959 (C.A.7 (Ill.)))

whether it would apply if a statute altered a sentencing factor.

The penalty "incurred" argument Dorsey raised is different from the one we addressed in *United States v. Bell*, 624 F.3d 803 (7th Cir.2010). In that case, the defendant argued that the statutory change in the FSA was procedural or remedial, and thus outside of the scope of the General Saving Statute. We found that "[n]o procedures or remedies were altered by the passage of the FSA," and that "the FSA's predominant purpose was to change the punishments associated with drug offenses." *Bell*, 624 F.3d at 815. This, however, does not foreclose the argument that the penalty is not "incurred" until the date of sentencing.

*5 Dorsey's view that a penalty is "incurred" on the date of sentencing is in some tension with the way the Supreme Court has examined the term "prosecution" under specific statutory saving provisions, *see, e.g., Bradley v. United States*, 410 U.S. 605, 609 (1973) (finding that under Drug Abuse Prevention and Control Act of 1970, "prosecution terminates only when sentence is imposed"); *Marrero*, 417 U.S. at 659 (also addressing 1970 Act, and finding that defendants already sentenced were not entitled to subsequently enacted parole eligibility due to statutory saving clause and General Saving Statute), with how other circuits have read the General Saving Statute, *see, e.g., United States v. Smith*, 354 F.3d 171, 175 (2d Cir.2003) (noting that "sentencing is an integral part of the 'prosecution' of the accused, as that term is used in § 109, and therefore that § 109 saves sentencing provisions in addition to substantive laws"), and with how the Supreme Court has addressed "retroactivity" with respect to a change in law while a case is on direct appeal, *see Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (not addressing the General Saving Statute, but finding that a "retroactivity" analysis in the context of the Civil Rights Act of 1991 focuses on whether a statute attaches new legal consequences to events completed before the statute's enactment date).

However, it is this tension, and the panel's lack of reconciliation of that tension, that warrants the full court's review.

For these reasons, I respectfully dissent from the denial of Dorsey's petition for rehearing en banc.

C.A.7 (Ill.),2011.

U.S. v. Fisher

--- F.3d ---, 2011 WL 2022959 (C.A.7 (Ill.))

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APPENDIX C



S. 1789

One Hundred Eleventh Congress
of the
United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,
the fifth day of January, two thousand and ten

An Act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Sentencing Act of 2010".

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

- (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "200 grams"; and
- (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

- (1) in paragraph (1)(C), by striking "50 grams" and inserting "200 grams"; and
- (2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPOSE.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

- (1) in subparagraph (A), by striking "\$4,000,000", "\$10,000,000", "\$20,000,000" and "\$30,000,000" and inserting "\$10,000,000", "\$25,000,000", "\$30,000,000", and "\$75,000,000", respectively; and

- (2) in subparagraph (B), by striking "\$2,000,000", "\$5,000,000", "\$14,000,000", and "\$10,000,000" and inserting "\$5,000,000", "\$25,000,000", "\$38,000,000", and "\$50,000,000", respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

- (1) in paragraph (1), by striking "\$4,000,000", "\$10,000,000", "\$8,000,000", and "\$20,000,000" and inserting "\$10,000,000", "\$50,000,000", "\$20,000,000", and "\$75,000,000", respectively; and
- (2) in paragraph (2), by striking "\$2,000,000", "\$5,000,000", "\$4,000,000", and "\$10,000,000" and inserting "\$5,000,000", "\$25,000,000", "\$8,000,000", and "\$50,000,000", respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 504 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 504 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if—

- (1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;
- (2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 866); or
- (3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and
- (B) the offense involved 1 or more of the following super-aggravating factors:
 - (i) The defendant—
 - (I) used another person to purchase, sell, transport, or store controlled substances;
 - (II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and
 - (III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.
 - (ii) The defendant—
 - (I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;
 - (II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;
 - (III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that—

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant—

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall—

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 211(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) **IN GENERAL.**—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797-u et seq.).

(b) **CONTENTS.**—The report submitted under subsection (a) shall—

- (1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;
- (2) address the effect of drug courts on recidivism and substance abuse rates;
- (3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;
- (4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and
- (5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

**SEC. 18. UNITED STATES SENTENCING COMMISSION REPORT ON
IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING
LAW.**

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*

APPENDIX D



Office of the Attorney General
Washington, D.C. 20530

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr. Attorney General

SUBJECT: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus. Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencing conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed*, *United States v. Douglas*, No. 10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In light of the differing court decisions—and the serious impact on the criminal justice system of continuing to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to “restore fairness in federal cocaine sentencing policy” but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act’s new mandatory minimum sentencing provisions to all sentencing that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the Act’s central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme—defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencing that take place after the bill was signed into law. That is what I direct you to undertake today.

MEMORANDUM

No. 11-5683

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD DORSEY SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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EDWARD DORSEY SR., PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI
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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that this Court should grant review to resolve a conflict among the courts of appeals about whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applies in a sentencing proceeding that takes place on or after the statute's effective date if the offense occurred before that date. On October 7, 2011, the United States filed a brief in Hill v. United States, petition for cert. pending, No. 11-5721 (filed July 1, 2011), agreeing that the Court should grant certiorari in that case to resolve the disagreement in the circuits over the question petitioner raises. Accordingly, the petition for a writ of certiorari should be held pending this Court's disposition of the

petition in Hill, and then disposed of as appropriate.'

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2011

* The government waives any further response to the petition unless this Court requests otherwise.

REPLY

BRIEF

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2011

EDWARD DORSEY SR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITIONER'S REPLY
TO RESPONDENT'S BRIEF

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AMENDED QUESTION PRESENTED¹

Did the Seventh Circuit err when, in conflict with the First and Third Circuits, it held that the Fair Sentencing Act of 2010 does not apply to all defendants sentenced after its enactment?

¹The question presented has been amended to reflect decisions by the Courts of Appeals that were issued after Petitioner filed his Petition.

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REPLY BRIEF

The government's 2-page brief acknowledges the need for this Court to grant certiorari to resolve the disagreement in the circuits over the question raised by Petitioner. Yet, the government does not recommend that this Court grant certiorari in this case. Rather, the government recommends that this Court grant certiorari in another case, *Hill v. United States*, No. 11-5721, and to hold Petitioner's case pending the disposition of *Hill*.

The government is correct that this Court should grant certiorari to resolve the circuit split on the Fair Sentencing Act's application. The government's recommendation that this Court grant certiorari in *Hill*, rather than this case, however, is unsound. This case, and not *Hill*, is an excellent vehicle to address the circuit split. Therefore, this Court should grant certiorari in this case and hold the petition in *Hill* pending the disposition of this case, or, at a minimum, grant certiorari in both this case and in *Hill*.

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE FAIR SENTENCING ACT APPLIES TO ALL THOSE SENTENCED AFTER ITS ENACTMENT OR AFTER NOVEMBER 1, 2010.

At the time Petitioner filed his Petition, the Circuits were divided 1-1-1 over whether the Fair Sentencing Act applies to individuals who committed their underlying offense conduct prior to the Act's enactment, but who were sentenced after the Act's enactment. The Eleventh Circuit had held that the Act applies to all individuals sentenced after its enactment, regardless of the date of the underlying criminal conduct. *United States v.*

Rojas, 645 F.3d 1234 (11th Cir. 2011). The First Circuit had held that the Act applies to all individuals sentenced on or after November 1, 2010, the effective date of the Act's amendments to the Guidelines, again, regardless of the date of the underlying criminal conduct. *United States v. Douglas*, 644 F.3d 39 (1st Cir. 2011). The Seventh Circuit, in Petitioner's case, had held that the Act applies only to those who commit their offenses of conviction after the Act's enactment. *United States v. Fisher*, 635 F.3d 336, 339-40 (7th Cir. 2011).

At present, the Circuit split now stands at 3-1-1. The Fifth and Eighth Circuits have joined the Seventh Circuit in holding that the Act applies only to those who commit their offenses of conviction after the Act's enactment. *United States v. Tickles*, – F.3d –, 2011 WL 4953988 (5th Cir. Oct. 19, 2011); *United States v. Sidney*, 648 F.3d 904 (8th Cir. 2011). The Third Circuit joined the Eleventh Circuit in holding that the Act applies to all those sentenced after its enactment, *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011), but the Eleventh Circuit then vacated its panel decision and granted rehearing *en banc* on the issue, *United States v. Rojas*, – F.3d –, 2011 WL 4552364 (11th Cir. Oct. 4, 2011). The First Circuit's position remains unchanged. *Douglas*, 644 F.3d 39.

With respect to the three Circuits who have held that the Act applies only to those who commit their offenses after the Act's enactment, intra-Circuit conflicts exist. In the Seventh Circuit, 5 of the 10 active Judges agree with the Third Circuit's position. *United States v. Holcomb*, – F.3d –, 2011 WL 3795170 (7th Cir. Aug. 24, 2011) (Williams, J., dissenting; Posner, J., dissenting). As does at least one Judge in the Fifth Circuit. *Tickles*,

- F.3d -, 2011 WL 4953988 at *2 (Stewart, J. dissenting). In the Eighth Circuit, 5 of the 11 active Judges would have granted rehearing *en banc* in *Sidney*. No. 11-1216, docket entry (8th Cir. Oct. 6, 2011). Yet, both the Seventh and the Eighth Circuits have refused to rehear this issue *en banc*, meaning that the circuit split on this issue will exist until this Court resolves it. *Id.*; *Holcomb*, 2011 WL 3795170 at *1.

In sum, as the government acknowledges, because the circuit split on this issue is established and entrenched, this Court should resolve it. Although the government asks this Court to do so in a different case, Petitioner respectfully asks this Court to do it in his case because his case is an excellent vehicle to address the issue.

II. THIS CASE IS AN EXCELLENT VEHICLE.

This case presents an ideal vehicle in which to address the Circuit split on this issue. Petitioner preserved the Fair Sentencing Act issue by raising it in both the trial and appellate courts. It was the only issue raised on direct appeal. There are no procedural complexities in this case. Nor are the facts complex or convoluted. Rather, the facts are straightforward: if the Fair Sentencing Act applies to Petitioner, he will receive a shorter sentence. His guidelines range, 37 to 46 months' imprisonment, is well below the 10-year sentence he received. Nothing in the sentencing transcript indicates that the district court would refuse to impose a much shorter sentence if it had the discretion to do so. Indeed, there is no apparent reason why the district court would vary upward from the advisory guidelines range in this case. And so, there is no reason why this Court should not grant this Petition and address the significant Circuit split on the Fair Sentencing

Act's application to those sentenced after its enactment.

For unknown reasons, the government believes that *Hill* is a better vehicle to address this issue. Petitioner disagrees for at least eight reasons.

First, *Hill* is not an ideal vehicle to address this Circuit split because the petitioner in that case was sentenced after November 1, 2010, whereas Petitioner was sentenced before November 1, 2010. This is important because the Circuits are split three ways on this issue, not just two. If this Court only grants certiorari in a post-November 1 case, like *Hill*, it will not be squarely presented with the Fair Sentencing Act's application to pre-November 1 cases, like Petitioner's case. As the First Circuit did in *Douglas*, this Court could ultimately issue an opinion that has no application to those sentenced prior to November 1, 2010. 644 F.3d at 46. To avoid this possibility, and the complexities associated with addressing an issue not squarely presented, this Court should grant certiorari in this case either instead of *Hill* or in conjunction with *Hill*. By doing so, this Court would squarely confront the totality of the Circuit split on this issue, and not just a portion of that split.

Second, Petitioner's case is the published opinion from the Seventh Circuit. *Fisher*, 635 F.3d 336. As the government concedes in its response brief in *Hill*, *Hill*'s case was an unpublished opinion that relied entirely on the published decision in Petitioner's case. It is only Petitioner's case that has precedential effect, not *Hill*'s case. 7th Cir. Rule 32.1(b). Without a principled reason why *Hill*'s case is more suitable for review than Petitioner's, which there is not, review should be of Petitioner's case, rather than, or at

least in conjunction with, Hill's case.

Third, Petitioner, and not Hill, sought rehearing *en banc* in the Seventh Circuit, which resulted in an influential dissent. *United States v. Fisher*, 646 F.3d 429, 430 (7th Cir. 2011) (Williams, J., dissenting). Judge Williams's dissent was cited by the Third Circuit in *Dixon*. 648 F.3d at 201. The government cites it in its response brief in *Hill*. It was the precursor to the dissents in *Holcomb*. 2011 WL 3795170 at *8. Petitioner has sought relief at every turn. Hill has not.

Fourth, Petitioner accepted responsibility and pleaded guilty, even though his advisory guidelines range was well below the mandatory minimum sentence, meaning that he had little to lose by going to trial. Hill did not. He forced the government to try him, which it successfully did. By his guilty plea, Petitioner's case is a better vehicle than Hill's case.

Fifth, the facts in Petitioner's case are more sympathetic. Petitioner pleaded guilty to 5.5 grams of crack cocaine; the threshold for mandatory minimum purposes was 5 grams of crack cocaine. The advisory guidelines range without the 10-year mandatory minimum was 37 to 46 months' imprisonment. There is nothing in the record to indicate that the district court would have imposed an upward variance in this case, nor is there anything in the record that would even support an upward variance. Thus, Petitioner's sentence was essentially increased three-fold based on .6 grams of crack cocaine. In contrast, Hill was still subject to a 5-year mandatory minimum sentence because he distributed a much greater quantity of crack cocaine, 53 grams. Even under the Fair

Sentencing Act, Hill is considered a serious drug trafficker; Petitioner is not.

Sixth, the published opinion in Petitioner's case also involved an individual sentenced prior to the Fair Sentencing Act's enactment. *Fisher*, 635 F.3d at 338. That Petitioner, Anthony Fisher, also seeks certiorari in this Court. *Fisher v. United States*, No. 11-6096. Some Judges have expressed scepticism over an interpretation of the general savings statute, 1 U.S.C. § 109, that permits the application of a new statute to those sentenced after it, but not before it. See *Holcomb*, 2011 WL 3795170 at *1 (Easterbrook, C.J.) ("As far as I am aware, the Supreme Court has never held any change in a criminal penalty to be partially retroactive. The choice always has been binary: retroactive or prospective."). If this Court were inclined to address the broader issues concerning the general savings statute's interpretation, it could do so by granting certiorari in Petitioner's case and in Fisher's case (undersigned counsel represents both Petitioner and Fisher). After all, both cases arise from the Seventh Circuit's published opinion on the Fair Sentencing Act's application. *Fisher*, 635 F.3d 336.

Seventh, Petitioner has raised arguments with respect to the interpretation of the general savings statute that neither the government nor Hill raise. One such argument was found persuasive by a district court judge. See *United States v. Holloman*, 765 F.Supp.2d 107 (C.D. Ill. 2011). That argument, and the others raised by Petitioner, deserve this Court's attention as well.

Finally, undersigned counsel notes that he was also counsel of record in the Seventh Circuit's decision in *Holcomb*, and he currently represents a total of 25 individuals with

Fair Sentencing Act claims either in this Court or the Seventh Circuit. The Office of the Federal Public Defender for the Central District of Illinois has been committed to this issue from the start, and it will remain committed to this issue until the end. Indeed, initially, this case was first in time: it was docketed as No. 11-5683 on August 5, 2011; *Hill* was docketed as 11-5721 on August 8, 2011. The government sought and received an extension in both cases on August 25, 2011. Their response in this case was due on October 6, 2011; the response in *Hill* was due the next day, October 7, 2011.

For some unexplained reason, the government requested a second extension of time in this case, yet then filed a timely response in *Hill*, meaning that *Hill* is now first in time solely because of the government's second extension in this case (an extension that appears to have been entirely unnecessary considering that, according to the government, this case and *Hill* present the same issue).² *Hill* is now slated for the November 4, 2011 conference, while this case has yet to be distributed. As the above demonstrates, there is no rational reason why the government delayed this case in favor of *Hill*. This case is a much better vehicle to address this issue.

For these reasons, this Court should grant certiorari in this case and either hold *Hill* pending the disposition of this case or grant certiorari in *Hill* in conjunction with this case.

²Indeed, in one of undersigned counsel's other cases, *Hyde v. United States*, No. 11-6364, the government's response was due ten days after it filed its response in *Hill*, yet the government nonetheless requested an extension to file a response. On October 25, 2011, it filed the identical 2-page response in *Hyde* as it filed in this case. It is difficult to believe that the government actually needed an extension to file this 2-page response.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should issue to review the Seventh Circuit's published decision in this case affirming Petitioner's sentence.

Respectfully submitted,
EDWARD DORSEY SR., Petitioner

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Dated: October 26, 2011

**JOINT
APPENDIX**

JAN 25 2012

OFFICE OF THE CLERK

In The
Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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**Petition For Writ Of Certiorari Filed August 1, 2011
Certiorari Granted November 28, 2011**

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**U.S. District Court
CENTRAL DISTRICT OF ILLINOIS (Urbana)
CRIMINAL DOCKET FOR CASE #:
2:09-cr-20003-MPM-DGB-1**

Case title: USA v. Dorsey

Date Filed # Docket Text

01/07/2009 1 INDICTMENT as to Edward Dorsey, Sr (1) Count 1. (SP, ilcd) (Entered: 01/07/2009)

04/20/2009 10 INFORMATION TO ESTABLISH PRIOR CONVICTION by USA as to Edward Dorsey, Sr (Miller, Eugene) (Entered: 04/20/2009)

06/03/2010 Minute Entry for proceedings held 6/3/2010 before Chief Judge Michael P. McCuskey. Appearance for Government by AUSA Eugene Miller. Defendant EDWARD DORSEY SR. present in person and with counsel John Taylor. Cause called for a bench trial. Defendant waives right to bench trial and requests a change of plea hearing. Change of Plea Hearing as to Edward Dorsey, Sr held. Defendant sworn; advised of rights, charges and possible penalties. Open plea entered by Edward Dorsey Sr (1) of guilty to one-count Indictment. If defendant is found to be a career offender the Court will allow him to withdraw his plea. Sentencing is set for 9/10/2010 at 10:00 AM in Courtroom A in Urbana before Chief Judge Michael P. McCuskey.

Defendant is remanded to custody of US Marshal. (Court Reporter LC.) (KM, ilcd) (Entered: 06/03/2010)

09/09/2010 20 SENTENCING MEMORANDUM by Edward Dorsey, Sr (Taylor, John) (Entered: 09/09/2010)

09/10/2010 Minute Entry for proceedings held on 9/10/2010 before Chief Judge Michael P. McCuskey: Appearance for the Government by AUSA Eugene Miller. Defendant EDWARD DORSEY SR present with counsel, AFDP John Taylor. Sentencing held for Edward Dorsey, Sr (1), Count 1. Parties acknowledge receipt of the presentence report; no objections. Discussion re defendant's sentencing memorandum. Fair Sentencing Act does not apply. Recommendations by counsel heard. It is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons for a period of 120 months. Upon release from custody, the defendant shall serve an eight-year term of supervised release. It is further ordered that the defendant shall pay a special assessment in the amount of \$100, due immediately. Appeal rights given. Defendant is remanded to the custody of the U S Marshal. Clerk is directed to file a notice of appeal on behalf of defendant. (Court Reporter BJ) (SP, ilcd) (Entered: 09/10/2010)

09/13/2010 23 JUDGMENT entered by Chief Judge Michael P. McCuskey on 9/13/2010. (SP, ilcd) (Entered: 09/13/2010)

09/13/2010 26 NOTICE OF APPEAL re 23 Judgment. (SP, ilcd) (Entered: 09/13/2010)

**United States Court of Appeals
for the 7th Circuit
Court of Appeals Docket # 10-3124**

UNITED STATES,

Plaintiff-Appellee

v.

EDWARD DORSEY, SR.,

Defendant-Appellant

09/13/2010 1 Criminal case docketed. IFP. Transcript information sheet due by 09/27/2010. Docketing Statement due for Appellant Edward Dorsey Sr. by 09/20/2010. Appellant's brief due on or before 10/25/2010 for Edward Dorsey Sr. [1] [6251035] [10-3124] (AD)

11/12/2010 9 Motion filed by Appellant Edward Dorsey, Sr. in 10-3124 to consolidate cases and to suspend briefing pending a ruling on this motion. [6265802] [10-3124, 10-2352] (AD)

11/19/2010 11 ORDER: IT IS ORDERED that the motion is GRANTED and these appeals are CONSOLIDATED for purposes of briefing, oral argument and disposition. IT IS FURTHER ORDERED that this appeal shall proceed to briefing. The remainder of the briefing schedule is as follows: (1) The defendant-appellant Edward Dorsey, Sr. shall file his brief and required short appendix in appeal no. 10-3124 on or before 11/24/2010. (2) Counsel for plaintiff-appellee shall file

their respective briefs on or before 12/27/10. (3) The defendants-appellants shall file their joint consolidated reply brief, if any, on or before 1/12/2011. Counsel for appellee are encouraged to avoid unnecessary duplication by filing a joint brief or a joint appendix or by adopting parts of a co-counsel's brief. Duplicative briefing will be stricken and may result in disciplinary sanctions against counsel. See United States v. Torres, 170 F.3d 749 (7th Cir. 1999); United States v. Ashman, 964 F.2d 596 (7th Cir. 1992). [9] DW [11] [6267256] [10-2352, 10-3124] [9]. [11] DW [6267256] [10-2352, 10-3124] – [Edited 11/19/2010 by KL] – [Edited 12/16/2010 by JAD] (KL)

11/23/2010 12 Motion filed by Appellant Edward Dorsey, Sr. in 10-3124 to extend time to file appellant's brief. [6268163] [10-2352, 10-3124] (KL)

11/24/2010 13 Order issued GRANTING motion to extend time to file appellant's brief: [12] Appellant's brief due on or before 12/03/2010 for Edward Dorsey Sr. in appeal no. 10-3124. Appellee's consolidated brief due on or before 01/03/2011 for United States of America. Appellants' reply briefs, if any, are due on or before 01/18/2011 for Appellant Anthony Fisher and Appellant Edward Dorsey Sr. CMD [13] [6268181] [10-2352, 10-3124] (KL)

12/06/2010 15 15 copies Appellant's brief filed by Appellant Edward Dorsey, Sr.. [6270774] [15] Electronically Transmitted. [15] [6270774] [10-3124] (LB)

01/05/2011 16 15 copies Appellee's brief filed by Appellee USA in 10-2352, 10-3124. [6277333] [16] Electronically Transmitted. [16] [6277333] [10-2352, 10-3124] (RS)

01/18/2011 17 15 copies Appellant's reply brief filed by Appellant Anthony Fisher in 10-2352, Appellant Edward Dorsey, Sr. in 10-3124. [6280210] [17] Disk Filed. [17] [6280210] [10-2352, 10-3124] (CO)

01/19/2011 18 Argument set for Tuesday, February 15, 2011, at 10:00 a.m in the Main Courtroom, Room 2721. Each side limited to 10 minutes. [18] [6280211] [10-2352, 10-3124] (RS)

02/04/2011 Received argument confirmation per argument email form for Daniel T. Hansmeier for Edward Dorsey Sr., in case 10-3124 Daniel T. Hansmeier for Anthony Fisher, in case 10-2352 [6284148-2] [6284148] [10-2352, 10-3124] (LJ)

02/15/2011 27 Case heard and taken under advisement by panel: Ilana Diamond Rovner, Circuit Judge; Diane P. Wood, Circuit Judge and Terence T. Evans, Circuit Judge. [27] [6286964] [10-2352, 10-3124] (LB)

02/15/2011 28 Case argued by Daniel T. Hansmeier for Appellant Anthony Fisher and Mr. Jonathan H. Koenig for Appellee USA in 10-2352, Daniel T. Hansmeier for Appellant Edward Dorsey, Sr. and Jonathan H. Koenig for Appellee USA in 10-3124. [28] [6286966] [10-2352, 10-3124] (LB)

03/11/2011 31 Filed opinion of the court by Judge Evans. The judgments as to Fisher and Dorsey are AFFIRMED. Ilana Diamond Rovner, Circuit Judge; Diane P. Wood, Circuit Judge and Terence T. Evans, Circuit Judge. [31] [6293112] [10-2352, 10-3124] (JLC)

03/11/2011 32 ORDER: Final judgment filed per opinion. With costs: no. [32] [6293124] [10-2352, 10-3124] (JLC)

03/23/2011 33 Filed 30c Petition for Rehearing and Petition for Rehearing En banc by Appellant Anthony Fisher in 10-2352, Appellant Edward Dorsey, Sr. in 10-3124. Dist. [33] [6296000] [10-2352, 10-3124] (FP)

04/05/2011 34 Sent clerk's copy of request to Appellee USA requesting 30 copies of their answer to the Petition for Rehearing and Petition for Rehearing En banc filed by Appellant Edward Dorsey, Sr. on 03/23/2011. Answer to Petition for Rehearing due for Appellee United States of America by 04/19/2011. [34] [6298617] [10-3124] (AD)

04/19/2011 36 Filed 30c paper Answer to Petition for Rehearing and Petition for Rehearing En banc by Appellee USA, per order. Dist. [36] [6302389] [10-3124] (KL)

05/25/2011 37 OPINION filed DENYING Petitions for Rehearing and for Rehearing En banc. Frank H. Easterbrook, Chief Judge; Richard A. Posner, Circuit Judge; Joel M. Flaum, Circuit Judge; Michael S. Kanne, Circuit Judge; Ilana Diamond Rovner, Circuit Judge; Diane P. Wood, Circuit Judge; Ann Claire Williams, Circuit Judge, dissenting; Diane S. Sykes, Circuit Judge; John Daniel Tinder, Circuit Judge and David F. Hamilton, Circuit Judge, dissenting. [37] [6310811] [10-2352, 10-3124] (AM)

06/02/2011 38 Mandate issued. Entire record returned consisting of 3 sealed envelopes. Record to be returned later 1 vol. of loose pleadings. [38] [6312544] [10-2352, 10-3124] (JC)

08/05/2011 39 Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. 11-5683. [39] [6328544] [10-3124] (KH)

11/29/2011 40 Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. 11-5683. [40] [6355276] [10-3124] (AM)

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION**

UNITED STATES)
OF AMERICA,)
Plaintiff,) No. CR 09-20003
vs.) Title 21, United States
EDWARD DORSEY SR.,) Code, Section 841(a)(1) &
Defendant.) (b)(1)(B)(iii).

INDICTMENT

(Filed Jan. 7, 2009)

COUNT I

THE GRAND JURY CHARGES:

On or about August 6, 2008, in Kankakee County,
in the Central District of Illinois,

EDWARD DORSEY SR.,

defendant herein, did knowingly possess five grams
or more of a mixture and substance containing co-
caine base ("crack"), a Schedule II controlled sub-
stance, with the intent to distribute it.

In violation of Title 21, United States Code,
Section 841(a)(1) & (b)(1)(B)(iii).

A TRUE BILL.

s/ Foreperson
FOREPERSON

s/ Jeffrey B. Lang
RODGER A. HEATON
United States Attorney
ELM

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION**

UNITED STATES)
OF AMERICA,)
Plaintiff,)
vs.) Case No. CR 09-20003
EDWARD DORSEY SR.,)
Defendant.)

**INFORMATION CONCERNING
PRIOR CONVICTIONS**

(Filed Apr. 20, 2009)

Pursuant to 21 U.S.C. § 851, the United States of America, by Rodger A. Heaton, United States Attorney for the Central District of Illinois, and Eugene L. Miller, Assistant United States Attorney, respectfully notifies the Court that it intends to rely on the following prior convictions of defendant as a basis for an increased punishment in this case:

| <u>Offense</u> | <u>Date of Conviction</u> | <u>Case No.</u> | <u>Court</u> |
|--|-------------------------------|-----------------|------------------------|
| Possession of a Controlled Substance | 03/16/1993 | 92-CF-44 | Kankakee County, IL |
| Possession of a Controlled Substance with Intent to Deliver | 08/09/2004 | 04-CF-108 | Kankakee County, IL |

With one or more prior final convictions for a felony drug offense, pursuant to 21 U.S.C. § 841(b)(1)(B)(iii), upon conviction for Count 1 of the Indictment, the defendant shall be sentenced to a term of imprisonment of not less than ten years and not more than life imprisonment, a fine not to exceed \$4,000,000, a term of supervised release of at least eight years in addition to such term of imprisonment, and a mandatory \$100 special assessment.

Pursuant to 21 U.S.C. § 851(b), any challenge to a prior conviction that is not made before sentence is imposed may not thereafter be raised to attack the sentence. Pursuant to 21 U.S.C. § 851(c), if the defendant denies any allegation of this information of prior convictions or claims that any conviction alleged is invalid, he should file a written response to the information.

Respectfully submitted,

RODGER A. HEATON
UNITED STATES ATTORNEY

s/ Eugene L. Miller
Eugene L. Miller, Bar No. IL 6209521
Assistant United States Attorney
United States Attorney
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[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

Docket No. 09-20003

vs.

EDWARD DORSEY, SR.,

Urbana, Illinois
June 3, 2010
1:28 p.m.

Defendant.

CHANGE OF PLEA HEARING

BEFORE THE HONORABLE MICHAEL P. McCUSKEY
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: EUGENE L. MILLER, ESQUIRE
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201 South Vine Street
Urbana, Illinois 61802
(217) 373-5875

For the Defendant: JOHN C. TAYLOR, ESQUIRE
Assistant Federal Defender
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Urbana, Illinois 61801
(217) 373-0666

Court Reporter: LISA KNIGHT COSIMINI,
RMR-CRR
U.S. District Court
201 South Vine, Suite 344
Urbana, Illinois 61802

Proceedings recorded by mechanical stenography;
transcript produced by computer.

[2] THE COURT: This is the United States of America versus Edward Dorsey, Sr., Case Number 09-20003.

Present in open court is the defendant, Edward Dorsey, Sr., accompanied by his attorney, John Taylor; the United States of America represented by its assistant U.S. attorney, Eugene Miller.

Mr. Miller, who accompanies you at counsel table?

MR. MILLER: This is Special Agent Jeff – Jeffrey Martin of the Kankakee Area Metropolitan Enforcement Group.

THE COURT: He's the case agent?

MR. MILLER: Yes, Your Honor.

THE COURT: How's his name spelled, first name?

MR. MILLER: J-e-f-f-r-e-y.

THE COURT: – r-e-y, okay.

In this case, the defendant was indicted on January 7, 2009. A grand jury indictment charged that on or about August 6, 2008, in Kankakee County, in the Central District of Illinois, Edward Dorsey, Sr., Defendant herein, did knowingly possess five grams or more of a mixture and substance containing cocaine base, crack, a Schedule II controlled substance, with the intent to distribute it, in violation of Title 21, United States Code, Section 841(a)(1) and (b)(1)(B)(iii).

[3] Following the grand jury indictment, the defendant appeared before United States Magistrate Judge David G. Bernthal on January 9, 2009, after an arrest warrant had issued. He was brought before Magistrate Judge Bernthal for arraignment. He was advised of his rights, including the right to counsel. He requested Court-appointed counsel and filed a financial affidavit.

Judge Bernthal appointed the assistant federal defender, John Taylor, to represent him. Mr. Taylor was present. The arraignment occurred. The defendant requested a trial by jury after pleading not guilty.

The defendant has been detained, awaiting trial. The order of detention was entered on January 13, 2009.

Following the jury trial setting of March 16, 2009, on February 13, a motion to continue and vacate the jury trial was filed by the defendant. That motion was heard on February 26, 2009. The case was then placed on a status call, and the status has occurred in this case.

From that period of time until – on October 5, 2009, a status conference was held; and Mr. Dorsey requested the matter be set for a bench trial, and ultimately Mr. Dorsey signed a waiver of jury trial on April 10, 2009, which also in Federal Court requires the consent of the government, as well as the Court.

[4] So am I correct, Mr. Dorsey, that I have before me docket number 15, the waiver of jury trial, which you signed on that date? Is that correct?

DEFENDANT DORSEY: Yes, Your Honor.

THE COURT: And, Mr. Taylor, you signed the waiver of jury trial on April 9th?

MR. TAYLOR: I did, Your Honor.

THE COURT: And, Mr. Miller, you signed it on behalf of the government on April 9?

MR. MILLER: Yes, Your Honor.

THE COURT: And the Court agreed on April 9, 2010, that this case would proceed to a bench trial after the defendant orally also, in addition to his signature, orally waived his constitutional right to a trial by jury.

The parties in this case in anticipation of today's date have filed a witness list and an exhibit list. The government's witness list had been filed earlier, docket 13, on January 6th. It lists Special Agent Jeff Martin, who's present in open court; Special Agent Michael Sneed; Special Agent Lonnie Sturkey, S-t-u-r-k-e-y; Special Agent Gary Tison, T-i-s-o-n; Special Agent Clayt, C-l-a-y-t, Wolfe, W-o-l-f-e; and Pamela Wilson, a forensic scientist of the Illinois State Police Laboratory in Joliet.

[5] Mr. Miller, how many of those witnesses do you intend to call today?

MR. MILLER: We would call all of those witnesses, Your Honor.

THE COURT: All of those witnesses, all six?

MR. MILLER: Yes, Your Honor.

THE COURT: And, Mr. Taylor, you filed with the Court - I'm pretty sure; I'll have to see the document - yes. You filed on April 13th that the defendant adopts the government's witness list in its entirety. So you will have an opportunity not only to cross-examine any of those witnesses, but to call them as your own witnesses, if you wish.

MR. TAYLOR: May I, Your Honor?

THE COURT: Yes.

MR. TAYLOR: The best laid plans of mice and men often go awry. If the Court would give me six and a half minutes, I believe we have a written plea agreement which will take care of all issues in this case.

THE COURT: Okay. Well, let me finish my part of this -

MR. TAYLOR: I'm sorry, Judge. I apologize.

THE COURT: - my part of the performance today, and then I'll allow you to address the Court.

MR. TAYLOR: Thank you, Judge.

[6] THE COURT: - in the event that it doesn't happen.

So you – we have the six witnesses available, and they are the six witnesses that you adopted. So they're available to the defense.

The government also has filed in this case an exhibit list which is very short. Government Exhibit Number 1 is a plastic bag containing 11 separate bags containing cocaine base, crack, seized from Edward Dorsey, Sr., on August 6, 2008, and a photograph of Exhibit 1. That was filed as docket 12.

Mr. Miller, those are still the exhibits you intend to use if the case proceeds to bench trial?

MR. MILLER: Yes, Your Honor.

THE COURT: And, Mr. Taylor, in your notice of adoption, you also adopted those exhibits as yours; is that correct?

MR. TAYLOR: That's correct, Your Honor.

THE COURT: So you have no additional witnesses, other than the six people I've named, and no exhibits other than the ones I've just named?

MR. TAYLOR: That's a correct statement, Your Honor.

THE COURT: We also have a stipulation of fact in this case that – docket 16, filed April 9, 2010: [7] "Now comes the United States of America by Jeffrey B. Lang, Acting United States Attorney for the Central District of Illinois, and Eugene L. Miller, assistant United States attorney, and the defendant, Edward Dorsey, Sr." – which Mr. Dorsey did sign also

on April 9th, as well as his attorney, John C. Taylor – and the parties, including the defendant, stipulate to the following facts during the bench trial.

“One, that on August 6, 2008, at the Model, M-o-d-e-l, Motel, in Kankakee County, Illinois, in the Central District of Illinois, the defendant, Edward Dorsey, Sr., knowingly possessed cocaine base, crack, with the intent to deliver it to another person.”

So the stipulation of fact, of course, sets jurisdiction in the Central District of Illinois as being uncontested and sets the delivery, possession and delivery of cocaine base, crack, also as a fact not contested.

As I understand it, if the case proceeds to bench trial, the only issue to be contested is the weight of the crack cocaine, Mr. Miller?

MR. MILLER: Yes, Your Honor.

THE COURT: Is that also true if the case proceeds to bench trial, Mr. Taylor?

MR. TAYLOR: That's correct, Your Honor.

[8] THE COURT: So with that, the Court has all of the necessary agreements to proceed to a bench trial; and without yet asking the attorneys whether they wish to make opening statements, I'll now defer to you, Mr. Taylor. So you may be heard.

MR. TAYLOR: Your Honor, first, I want to apologize for jumping the gun. I'm trying to save time.

THE COURT: Well, but, in this case, we've had a number of, you know, jury trial, nonjury trial, when jury trial; so I never assume that anything will happen until it happens. So that's why I wanted to set everything up for a bench trial because we have the entire afternoon set aside for that.

MR. TAYLOR: And I appreciate that, Your Honor. That's well put.

I believe we have a written agreement to present to the Court, which happened about 15 minutes ago, Your Honor.

THE COURT: Need more time to review it?

MR. TAYLOR: I think if I had six minutes, Your Honor, we'd be –

THE COURT: So what if I give you ten?

MR. TAYLOR: That would be enough, Judge.

THE COURT: And looking at the clock, I'm going to give you twelve.

[9] MR. TAYLOR: Thank you, Judge.

THE COURT: So we'll come back at ten minutes to 2:00. We'll be in recess until ten minutes to 2:00.

(Recess, 1:39 p.m. to 1:53 p.m.)

THE COURT: I gave you 15 minutes, Mr. Taylor, so six times two and a half. Where are we at?

MR. TAYLOR: Your Honor, we are prepared to plead guilty, an open plea to Count 1 of the indictment. Thank you, Your Honor.

THE COURT: Mr. Dorsey, is that correct?

DEFENDANT DORSEY: Yes.

THE COURT: Okay. Well, it's been a while since I've done an open plea. So if I'm missing any of the elements, somebody will help me.

So I need you to stand, raise your right hand, and you'll be administered an oath, Mr. Dorsey.

(Defendant sworn, 1:55 p.m.)

EXAMINATION BY THE COURT:

Q Mr. Dorsey, do you understand that it's almost 2:00 – I work till 5:00 – so we have more than enough time to proceed to a bench trial this afternoon? Do you understand that?

A Yes, I do.

Q So if you wish to proceed to a bench trial, we may do so; but I've just been advised by Mr. Taylor that [10] what you would like to do is to change your plea of not guilty, waive your right to a bench trial, and proceed to plead guilty to the matter in the indictment that I read earlier this afternoon.

Is that correct?

A Yes.

Q Has anybody forced you to do this?

A No.

Q Threatened you in any way?

A No.

Q Promised you anything to get you to do this?

A No.

Q Now, before I can accept your guilty plea to the matter in the indictment, there are a number of questions that I have to ask you to make sure this is a valid plea; and if you do not understand any of my questions or at any time you want to consult with Mr. Taylor, please say so. It's essential to a valid plea that you understand each question before you answer so I can determine that your plea is freely, voluntarily, knowingly, and intelligently made.

Do you understand that?

A Yes, I do.

Q Just - because you've taken an oath, that means the answers to my questions will subject you to the [11] penalty of perjury or of making a false statement. Perjury is a criminal offense punishable by up to five years imprisonment and up to a \$250,000 fine if you have the ability to pay.

Also, making a false statement is also a criminal offense punishable by up to five years of imprisonment and a fine of \$250 if you have the ability to pay;

and they could be, in certain circumstances, also consecutive sentences as well as consecutive to any sentence that you would plead — that you would plead guilty to in this case, any sentence you would receive for pleading guilty and then they could be consecutive.

So it's very important that you answer truthfully and honestly. Do you understand that, Mr. Dorsey?

A Yes, I do.

Q How old are you?

A 38.

Q How far did you go in school?

A Graduated out of high school from St. Anne High School.

Q St. Anne in Kankakee County in the State of Illinois; is that right?

A Yes.

Q And all that education was in the English [12] language?

A Yes, it was.

Q Did you go — take any college, junior college, trade, or technical classes after leaving St. Anne High School?

A No, I didn't.

Q With that education, are you able to speak, read, write, and understand the English language?

A Yes.

THE COURT: Mr. Taylor, do you believe that Mr. Dorsey can read, write, and understand the English language?

MR. TAYLOR: I do, Your Honor.

THE COURT: Have you had communications with him other than face-to-face? Any written communications?

MR. TAYLOR: Oh, we've had lots of face-to-face conferences, Your Honor.

THE COURT: No, but I said: Have you ever had a chance to see his writing?

MR. TAYLOR: I'm sorry, Judge. Yes, I have.

THE COURT: And, do you have any question that he is fully competent to understand these proceedings and enter into a knowing, voluntary, and intelligent plea?

MR. TAYLOR: I have no such questions, Your Honor.

[13] THE COURT: Has there been any prior proffers or conversations that he's had with any government agents or Mr. Miller, the prosecutor in this case?

MR. TAYLOR: There's been no proffers, Your Honor. I believe not.

THE COURT: Mr. Miller, would that be correct, that you've not had any communication with Mr. Dorsey other than what's occurred here in open court throughout this case?

MR. MILLER: That would be correct, Your Honor. As regarding the agents, other than on the date of his arrest back on August 6th of 2008 when he waived his *Miranda* rights and spoke with the agents and signed a written statement, they have had no contact with him beyond that.

THE COURT: Now, those agents, if they were to testify today in the afternoon here in a bench trial, what would they say about the *Miranda* warnings?

MR. MILLER: Your Honor, that they gave him the *Miranda* warnings, both verbally and with a written form; that Mr. Dorsey signed that written form in the witness of two agents, Special Agent Martin who is seated here and Special Agent Lonnie Sturkey; that he waived his *Miranda* rights; that he spoke with them; that they wrote down what he told them in a written statement; and that [14] he then signed that written statement in front of them; and that through that, course of that interview, there was no coercion and no indication that any of the statements that he made were not involuntary, nor was there any indication that he was not fully competent and knew what was going on during that interview.

THE COURT: Mr. Taylor, in this case, you've received discovery relative to the *Miranda* warnings and the statements?

MR. TAYLOR: Yes, we have, Your Honor.

THE COURT: And you have not filed any motion to suppress?

MR. TAYLOR: I have not, Your Honor.

THE COURT: Is that because you - in conversations with Mr. Dorsey you believe that he was properly Mirandized and gave a statement freely and voluntarily?

MR. TAYLOR: That's correct, Your Honor.

THE COURT: Thank you, Mr. Taylor.

The Court at this time has no question about Mr. Dorsey's ability to speak, read, write, and understand the English language.

BY THE COURT:

Q Mr. Dorsey, let's see, you've been in custody since when?

[15] A August 6, 2008.

Q Okay. Now, when you came into custody in Kankakee County, were you on any prescription drugs at that time?

A No, not at that time.

Q Are you now under prescription medication?

A Yes, I am.

Q And what kind of prescription medication do you take?

A It's for acid reflex, or something like that.

Q And is that something you take every day?

A Yes.

Q And how often do you take it?

A Once a day.

Q With a meal or when you get up or when you go to bed? What would be the routine?

A Once a day in the evening with a meal.

Q Okay. The last time you would have taken it would be last night?

A Yes.

Q Do you believe it has any effect on your ability to understand what people are saying to you or perceive your surroundings?

A No, no effect.

Q Do you believe it has any effect on your [16] ability to understand the proceedings today and what I'm saying to you?

A No.

Q Are you taking any other prescription medication?

A No, I'm not.

Q In the last 24 hours, have you consumed any narcotic drugs, medicine, or pills other than the acid reflux drug you talked about?

A No. That's all.

Q And have you consumed any alcoholic beverages or any other mood-altering substances?

A No, I haven't.

Q Do you believe you understand what's happening today?

A Yes, I do.

Q Could you tell me in your own words what's happening today?

A I'm having an open plea, pleading guilty to the possession/attempted delivery up to 5.5 grams of crack cocaine base.

THE COURT: And, Mr. Miller, is it 5.5 grams based on the lab analysis?

MR. MILLER: It is, Your Honor.

THE COURT: And, Mr. Taylor, do you agree?

[17] MR. TAYLOR: I do, Your Honor.

BY THE COURT:

Q So if I read the indictment with that added, Mr. Dorsey, would you be pleading guilty to this offense? So just listen. This is the indictment just amended based on what you said.

On or about August 6, 2008, in Kankakee County, in the Central District of Illinois, Edward Dorsey, Sr., Defendant herein, did knowingly possess approximately 5.5 grams of a mixture and substance containing cocaine base, crack, a Schedule II controlled substance, with the intent to distribute it, in violation of the United States Code.

Would that be what you're pleading guilty to?

A Yes, it is.

Q And you are not then asserting that, at this time, that the substance that you were in possession of on August 6 was anything other than crack? You're not asserting that, right?

A No, I'm not.

Q And you're not asserting that you possessed it with anything but the intent to distribute it; is that correct?

A That's correct.

Q And you're not asserting that it was less than [18] five grams of crack cocaine?

A No, I'm not.

Q Now, do you understand you have a right to a bench trial today?

A Yes, I do.

Q And I would do something that probably Mr. Miller would be upset with; but if you wanted a jury trial, I would even reinstitute your right to a jury trial if you wanted that. Do you understand that?

A Yes, I do.

Q So even though you previously waived a jury trial, if you wanted it, I would give you a jury trial if you wanted to proceed that way. Do you understand that?

A Yes.

Q Even though you previously waived a jury trial and agreed to a bench trial, if you did not want to plead guilty and still wanted to dispute the amount of crack cocaine, I would give you a bench trial this afternoon and ignore what you've just said and make the government prove the amount of crack of being five grams or more, make them prove that beyond a reasonable doubt based on evidence and ignore the admission you just made.

Do you understand that?

A Yes.

Q Knowing that, do you still wish to proceed with [19] an open plea of guilty today?

A Yes.

Q Has anybody forced you to say that?

A No.

Q Threatened you in any way?

A No.

Q Promised you anything to get you to say that?

A No.

Q And when I say promised you, I mean promised you any specific sentence from this Court to get you to say that?

A No, they haven't.

Q Have you ever been under the care of a psychiatrist before?

A No.

Q And since you've been in jail, since August 6, 2008, you've received a prescription from a doctor for the acid reflux; is that right?

A Yes.

Q When did you receive that prescription?

A I'm gonna say at least - could be nine, ten months, almost a year.

Q Okay. And you saw a doctor to receive that prescription?

A Yes.

[20] Q Have you had a physical since you've been in the, the – incarcerated since August 6, 2008?

A What you mean by "physical"?

Q Oh, a doctor look at your eyes, your ears, check your heart, or anything like that?

A Yes, I have.

Q And so you told the doctor about the problems that you were having with upset stomachs and things like that, and the doctor then examined you and determined that it was acid reflux that needed to be treated?

A Yes.

Q Have you had any other maladies that you've sought to be treated since you've been incarcerated in the last, approximately, two years?

A Nothing but cluster migraines. That something that I have a history of.

Q What's that? Oh, mi –

A Cluster migraines, yes.

Q Are you having any of those cluster migraine headaches today?

A No.

Q That would cause intense pain and may make it difficult for you to understand what was happening, but that's not happening today?

A No, it's not.

[21] Q When's the last time you had one of those cluster migraine headaches?

A A few days ago.

Q Anything about that few days ago that would affect you today or in any way affect your ability to understand these proceedings today?

A No, it wouldn't.

THE COURT: Mr. Taylor, do you have any doubt as to Mr. Dorsey's mental competence to enter a knowing, voluntary, and intelligent plea today?

MR. TAYLOR: I do not, Your Honor.

THE COURT: Mr. Miller, do you have any doubt about his mental competence to enter into a knowing, voluntary, intelligent plea today?

MR. MILLER: No, Your Honor.

THE COURT: The agents that you've talked to who were going to testify, is there anything about their arresting Mr. Dorsey, their Mirandizing him, interrogating him on August 6, 2008, or any observations that they've had of him that would in any way cast doubt on his competence to enter into a knowing, voluntary, intelligent plea?

MR. MILLER: Nothing whatsoever, Your Honor.

THE COURT: Based on Mr. Dorsey's responses, which he is a, has a great voice - he has a radio [22] voice - and his responses to this Court are very clear, concise, and I have no questions based on my questions of him today.

Plus, he's been in front of me before when he previously waived his right to a trial by jury; and we went through many constitutional rights about what he was giving up in a jury trial, and I'll be going through those again today.

But I have no question, based on my observations of him for well over a year - he's been in front of me over a year and a half - that he's fully competent.

That's also based on the representations of Mr. Taylor, Mr. Miller, as well as Mr. Miller recounting what the testimony would be of police officers if called to testify in a bench trial.

So, therefore, the Court finds that Edward Dorsey, Sr., is fully competent to understand these proceedings and enter into a knowing, voluntary, and intelligent plea.

BY THE COURT:

Q Mr. Dorsey, have you had an ample opportunity to discuss your case with Mr. Taylor, your attorney, who's here today?

A Yes, I did.

[23] Q And are you satisfied with his representation of you throughout these proceedings?

A Yes, I am.

Q Under the Constitution and the laws of the United States, you have an absolute right to a jury trial. And even though you've waived it, I've told you I would reinstate that. You certainly have a right to a bench trial this afternoon, which is scheduled; and the Court has ample time to hear that bench trial today.

Do you understand that?

A Yes, I do.

Q Also, no one, including myself as judge of this Court; your attorney, Mr. Taylor; government attorney, Mr. Miller; any of the agents of the government who have come here to testify today – no one can deny your constitutional right to a jury trial on the charges contained in the indictment. You've previously waived them, but I've indicated to you I would reinstate them today if you requested that.

Do you understand you're the only person that can waive your right to a jury trial?

A Yes, I understand, Your Honor.

Q And you understand that by pleading guilty today you're also waiving your right to a bench trial as well as the jury trial that I would reinstate; and, [24] therefore, if you plead guilty today, there would be no trial of any kind in this case?

A Yes. I understand.

Q And that's how you wish to proceed?

A Yes, sir.

Q Have you ever been involved in a jury trial before?

A No, I haven't, sir.

Q You ever been involved in a bench trial before?

A No.

Q A jury trial would be twelve men and women who would be selected from East Central Illinois, counties that would include Kankakee and go as far south as Charleston, Mattoon, directly from Kankakee down to those towns, Danville to Decatur, Champaign-Urbana, Rantoul, a large area. Twelve men and women in a jury trial would determine whether the government has proven its case against you beyond a reasonable doubt.

In a bench trial, the same would be true except there would be no jury. The government would have to prove their case beyond a reasonable doubt to me. The difference is in a jury trial all twelve people would have to unanimously agree to a finding of guilty beyond a reasonable doubt before you could be convicted. In a bench trial, it would only require me to make that [25] determination.

So do you have any question about the difference between a bench trial and jury trial?

A No, I don't, Your Honor.

Q And do you understand that you are presumed innocent. Even right now at this minute, you're still presumed innocent because I've not made any findings of fact or conclusion of law, nor have entered a judgment of conviction against you. So even as of right now, you could proceed if you wanted to a bench trial or jury trial; and you would still be presumed innocent at that trial.

Do you understand that?

A Yes, I do.

Q Also, at a bench trial or a jury trial, you would not be required to present evidence. The burden is on the government. It is on the government throughout the trial to prove you guilty beyond a reasonable doubt; and if the government failed to do that, a jury must return a verdict of not guilty.

The same would be true if the government failed to prove you guilty beyond a reasonable doubt. This Court should return a verdict of not guilty.

You would have a right to appeal a finding of verdict of guilty from a jury or from this Court in a [26] bench trial. Either way, you could then appeal to have the Seventh Circuit Court of Appeals determine whether the government had, in fact, produced evidence sufficient for a finding of guilty beyond a reasonable doubt and whether a reasonable jury could come to that conclusion or this Court could come to that conclusion.

So those are rights that would occur if there was a trial by a jury or a trial by a Court. You understand you're giving up the right to a trial by either; and based on your own testimony today, if the Court finds it freely and voluntarily admitted, you would be convicted based on your admission today and waive the right for the government to prove you guilty beyond a reasonable doubt?

Do you understand that?

A Yes, Your Honor.

Q At trial, you don't have to present evidence. You don't have to testify. You have an absolute right to remain silent, and the government can't make you testify. They can't call you as a witness.

Nor could the fact that you did not testify or present evidence be used by a jury or by this Court in any way to determine whether you've been – whether the government's met the elements of proving you guilty beyond a reasonable doubt because that silence cannot be [27] used against you.

Do you understand that?

A Yes, I do.

Q Do you understand that today, by pleading guilty, you cannot remain silent. You would have to admit whether you committed the offense charged; and your admission could be used, if there's a factual basis for it, to support the Court finding you guilty based on your admission?

Do you understand that?

A Yes, I do.

Q And it is your desire to proceed with an admission of guilt and acceptance of responsibility for what's charged in the indictment; is that correct?

A Yes. That's correct.

Q If you went to trial, do you understand that Mr. Taylor would have a right to cross-examine these witnesses, the witnesses that I named earlier this afternoon? Mr. Taylor would have a right to cross-examine them, to object to testimony he thought was either prejudicial, without probative value, was irrelevant, was under the Federal Rules of Evidence in criminal procedure – should not be allowed. All those things he could object to. He could object to the laboratory analysis and how it was done in this case.

[28] But by pleading guilty, you give up the right for Mr. Taylor to cross-examine witnesses, to object to evidence, to make objections to how the government's proceeding because there would be no trial and no right to object.

Do you understand that?

A Yes.

Q So you understand you're giving up the right to a trial by jury, –

A Yes, I am.

Q - a trial by the Court, a presumption of innocence, a requirement that the government prove you guilty beyond a reasonable doubt with witnesses that would have to be presented in court, the right for Mr. Taylor to cross-examine those witnesses, and object to any evidence offered by the government; and if - finally if you chose, you could take the stand - you're not required to; you could remain silent - but you could even take the stand on your behalf and present evidence to cast doubt on the government's case.

You understand all of those rights, all of those procedures would be given up by you pleading guilty today?

A Yes. I understand.

Q That is your desire, and it is a desire that no [29] one's forced you to make; you're doing it of your own free will. Is that correct?

A That's correct.

Q And you understand if you plead guilty and I accept it, there will be no trial whatsoever today; and if the government presents a factual basis to support it, you would be found guilty today, and we would set a sentencing date approximately 90 to 120 days from now?

Do you understand that?

A Yes. I understand.

Q You understand today I cannot tell you what your final sentence will be because I do not know your criminal history or your prior felonies; and, therefore, the open plea – all I could tell you is that by pleading guilty with a prior felony drug conviction you face a mandatory minimum ten years to life imprisonment.

THE COURT: Do you agree with that, Mr. Miller?

MR. MILLER: I do, Your Honor.

THE COURT: Do you agree with that, Mr. Taylor?

MR. TAYLOR: I do, Your Honor.

THE COURT: Because I don't have the sufficient background to tell you whether your criminal history and your advisory sentencing guideline range would exceed ten years.

Mr. Taylor, have you made any estimate?

[30] MR. TAYLOR: I have, Your Honor.

THE COURT: What is the estimate you've made that you've transmitted to Mr. Dorsey that he would be looking at if he pled guilty today?

MR. TAYLOR: First, Your Honor, the Court entered an order some time ago – and I'm glad you did – upon Probation to determine criminal history. They found he's not a career offender.

If that be true, Your Honor, then his minimum mandatory and his sentencing guidelines are identical, Your Honor, 120 months.

THE COURT: If Mr. Dorsey was found to be a criminal, career criminal after Probation gave you a statement that he is not, the Court would allow him to withdraw his plea of guilty.

MR. TAYLOR: Thank you, Your Honor.

THE COURT: So I'll – Mr. Miller, that's the same criminal history you received?

MR. MILLER: It is, Your Honor.

THE COURT: So do you agree that unless there's something wrong, meaning he's a career offender or somehow they missed something, he's looking at 120 months as an approximate sentence in this case because he would have less than that criminal history but then becomes a mandatory minimum 120 under the statute?

[31] MR. MILLER: I agree, Your Honor. His advisory guidelines will be very near that 120-month mandatory minimum.

THE COURT: And that's what you've transmitted to him, Mr. Taylor?

MR. TAYLOR: I have, Your Honor.

BY THE COURT:

Q And, Mr. Dorsey, that's what you expect by pleading guilty today, a sentence that would probably be 120 months?

A Yes, Your Honor.

Q I can't promise you that. Do you understand that?

A Yes, I do.

Q But I am promising you that if you – for somehow they've missed something and they come in and say, "Edward Dorsey, Sr., is a career offender," I would let you withdraw your plea of guilty.

Do you understand that?

A Yes, sir.

Q But I'm not making that promise if they come in here and say that your advisory guideline's 121, 125, even 150. I don't know what it will be. I'm only making that promises to you if it comes in as a career offender.

Do you understand that?

[32] A Yes.

Q Knowing that, are you still willing to proceed with a plea of guilty today?

A Yes, I am.

Q So you understand; this Court is not making any promise to you as to what your final sentence will be, other than if you're a career offender, we'll let you start over?

A Exactly.

Q That's only because of misrepresentation by Probation that we would do that. Do you understand that?

A Yes.

Knowing that, do you still want to plead guilty today?

A Yes, I do.

Q I've read the indictment to you at the beginning of these proceedings this afternoon. I've read it to you with your statement that approximately 5.5 grams is what you're pleading guilty to. Do you want me to read the indictment to you again?

A No, Your Honor.

Q You're satisfied that you understand what you're pleading guilty to today?

A Yes, I am.

THE COURT: Mr. Miller, would you explain in a [33] precise and meaningful manner the essential elements of the offense charged to which Mr. Dorsey intends to plead guilty today.

MR. MILLER: Your Honor, there are two essential elements to the offense of possession of five grams or more of cocaine base, crack, with the intent to distribute it, each of which the United States must prove beyond a reasonable doubt: First, that the defendant knowingly possessed five grams or more of a mixture or substance containing cocaine base, crack, and, second, that the defendant possessed the cocaine base, crack, with the intent to deliver it to another person.

Importantly, for purposes of this plea, the term "knowingly" means the defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake or accident.

But it is sufficient that the defendant knew that the substance was some kind of prohibited drug. As the Seventh Circuit has found, it does not matter whether the defendant knew the substance was cocaine base, crack, or that it weighed five grams or more.

And as we'd note – as we've noted, the term "cocaine base, crack," refers to "crack" as it's defined in United States Sentencing Guidelines, which is the street name for a form of cocaine base, usually prepared [34] by processing cocaine hydrochloride and sodium bicarbonate and usually appearing in a lumpy rock-like form.

THE COURT: Mr. Taylor, do you agree with the elements of the offense?

MR. TAYLOR: I do, Your Honor.

BY THE COURT:

Q Mr. Dorsey, do you have any questions about the elements of the offense?

A No, I don't, Your Honor.

Q And we've talked about the maximum possible punishment could be more than 120, based on whatever your advisory guidelines are; but it would be less than a career offender, but it would not be less than 120 months.

Do you understand that?

A Yes. I understand.

Q Do you understand that you're facing a fine of up to \$4 million, but that would be based on your ability to pay; a mandatory minimum eight years of supervised release – so we'll have eight years following whatever sentence you receive to keep you under supervised release by Probation in this district.

Do you understand that?

A Yes. I understand.

[35] Q And a \$100 special assessment, which would be due at the time of your sentencing.

Do you have any questions about the maximum punishment you face and the mandatory minimum sentence you face?

A No, Your Honor.

Q Again, has anybody threatened you or forced you in any way to plead guilty? Has your attorney made any promise or prediction as to what your final sentence would be?

A No, you haven't.

Q The elements of the offense – and I know I've asked you this before, but I'll ask more specifically. On August 6, 2008, you possessed approximately 5.5 grams of crack cocaine; is that correct?

A Yes, Your Honor.

Q And that's not powder. That was that rock-like substance that's sometimes off-white in color that is not a powder. It's been cooked up with probably powder cocaine, bicarbonate of soda to change its composition and its character into a hard, rock-like substance that people on the street call "crack," right?

A Yes, it is.

Q And that's what you possessed with an intent to distribute it to another person?

[36] A Yes.

Q And you – and you knew it wasn't powder; you knew it was crack, a controlled substance, illegal to possess and illegal to distribute, right?

A Yes.

Q And that you intended to possess it and distribute it. And you're pleading guilty to that because you are, in fact, guilty?

A Yes.

THE COURT: Okay. Mr. Miller, what would be the factual basis to support Mr. Dorsey's admission that he's made as to the elements of the offense and that he's pleading guilty to the indictment because he is, in fact, guilty? What would support that?

MR. MILLER: Your Honor, if the matter went to trial, the witnesses would establish that on August 6th of 2008, a confidential source cooperating with the Kankakee Area Metropolitan Enforcement Group made a controlled purchase of cocaine from the defendant, Edward Dorsey, Sr., at room number 10 of the Model Motel at 1245 South Washington Avenue, in Kankakee, Kankakee County, in the Central District of Illinois.

The defendant at that time had more cocaine in his possession and told the CS to come back if the CS ever wanted more.

[37] KAMEG agents did obtain a State Court search warrant for both the motel room and the defendant himself. On August 6, 2008, around 5:49 p.m., KAMEG agents executed that search warrant at room number 10 of the Model Motel.

The defendant was present at the time. The agents searched the defendant. In his front pants pocket, they found a plastic bag containing eleven

separate baggies, each containing cocaine base, crack, in total weighing, 5.9 grams. They also found a, about 0.1 grams of cocaine on a piece of cardboard in the room.

The agents checked with the front desk clerk and confirmed the room was rented to the defendant.

The defendant was Mirandized after he was arrested. He signed a written waiver of his rights and agreed to speak with agents. He admitted that the crack cocaine found in his pocket was his. He also stated that he did not smoke crack cocaine and admitted that he'd been selling the crack cocaine from room number 10 for the past two weeks, making approximately 100 to \$400 per day in profit.

The agents wrote down this information, and the defendant signed the written statement.

The seized substance from his pocket was sent to Illinois State Police Forensic Laboratory where on [38] November 2, 2008, Forensic Scientist Pamela Wilson determined it to be 5.9 grams of a chunky substance containing cocaine base, crack.

At the defendant's request, the cocaine base, crack, was weighed again on June 1st of 2009 at the same laboratory, again by Forensic Scientist Pamela Wilson; and she determined at that time that it weighed 5.5 grams.

The United States does believe this evidence would be sufficient to sustain the defendant's conviction on the sole count of the indictment.

THE COURT: Mr. Taylor, you've received discovery in the case?

MR. TAYLOR: I have, Your Honor.

THE COURT: Would the discovery in this case substantially comport with what Mr. Miller said?

MR. TAYLOR: It does, Your Honor.

BY THE COURT:

Q Mr. Dorsey, did you hear what Mr. Miller said?

A Yes, Your Honor.

Q Do you have any disagreement with it?

A No, Your Honor.

Q That's substantially correct?

A Yes.

Q That would support your plea of guilty; is that [39] correct?

A Yes.

Q And you are admitting that, whether the amount is 5.9 or 5.5 grams, that it was more than five grams as set forth in the indictment?

A Yes.

Q Five grams of crack cocaine; is that right?

A Yes.

Q You're pleading guilty because you are, in fact, guilty?

A Yes, I am.

THE COURT: The Court finds there's a factual basis for the guilty plea of Edward Dorsey, Sr. The Court finds that he's acknowledged his guilt. He's pled guilty to the matter in the indictment. He's acknowledged the factual basis for it. The Court's found him to be freely, voluntarily, knowing, intelligently making this plea with no force, threats, or promises of any kind from the government or his attorney.

The Court finds that, because it is voluntary, I accept the plea and enter judgment of conviction on the matter contained in the indictment.

Mr. Dorsey, a presentence report – I'll be ordering a presentence report, meaning Probation will be looking into your background. They've already got some [40] of it in your criminal history. So it will – they'll be able to move along with that. They'll probably be contacting either relatives or people, family members about you.

They'll probably want to meet with you, but I would direct that you cooperate, but make sure that Mr. Taylor's with you at the time of any interview so that he'll be able to assist you in answering the questions that Probation may ask.

Do you have a date?

DEPUTY CLERK: September 10th is 99 days.

THE COURT: September 10.

Okay. The deputy clerk says September 10, which we don't have yet either Mr. Taylor or Mr. Miller here. Check your calendars. Can either one of you be here?

MR. MILLER: That date's fine with the United States, Your Honor.

MR. TAYLOR: I'll be here, Your Honor.

THE COURT: We can set this at - we can set it at either 10:00 or 4:00. What would be your preference, Mr. Miller?

MR. MILLER: Either is fine, Your Honor.

THE COURT: Mr. Taylor?

MR. TAYLOR: 10:00, Your Honor, please.

[41] THE COURT: Good. Thank you.

We'll set the sentencing in this case for 10:00 on Monday, September 10th.

Is there - the defendant has been detained and will remain detained.

Anything further we need to do today?

The Court vacates the bench trial and has previously vacated the right to a jury trial, and we'll proceed to sentencing with the judgment of conviction entered.

Anything further, Mr. Miller?

MR. MILLER: No, Your Honor. Thank you.

THE COURT: Mr. Taylor?

MR. TAYLOR: No, thank you, Your Honor.

THE COURT: Thank you. That's all for the record. And we'll see you back here at 10:00 on September the 10th, which is a Friday, right?

DEPUTY CLERK: Right.

THE COURT: That's it. Defendant's remanded to the custody of the marshal.

(Hearing concluded, 2:29 p.m.)

[Reporter's Certification Omitted In Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF
AMERICA

Plaintiff,

v.

No.: 09-20003-001

EDWARD DORSEY, SR.,
Defendant.

***SENTENCING MEMORANDUM PURSUANT
TO THE FAIR SENTENCING ACT OF 2010
AND OBJECTION TO BEING SENTENCED
PER THE LAW REGARDING CRACK COCAINE
EXISTING BEFORE AUGUST 3, 2010.***

(Filed Sep. 9, 2010)

NOW COMES the Defendant, EDWARD DORSEY, SR., by and through his attorneys, Richard H. Parsons and John Taylor of the Federal Public Defender's Office of the Central District of Illinois, and MOVES THIS COURT to sentence him pursuant to the Fair Sentencing Act of 2010.

1. President Obama signed the Fair Sentencing Act of 2010 on August 3, 2010.
2. Defendant requests he be sentenced pursuant to the Fair Sentencing Act of 2010 and objects to being sentenced pursuant to the sentencing mandatory minimums existing and in effect prior to August 3, 2010.

WHEREFORE, Defendant respectfully requests the Court sentence him pursuant to the Fair Sentencing Act of 2010.

Respectfully Submitted,

EDWARD DORSEY, SR., Defendant

RICHARD H. PARSONS
Federal Public Defender

BY: s/John Taylor

JOHN TAYLOR

Assistant Federal Public Defender

300 West Main Street

Urbana, Illinois 61801

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[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

USA,)
Plaintiff,)
vs.) No. 09-20003
EDWARD DORSEY, SR.,)
Defendant.)

September 10, 2010
10:00 a.m.

Becky L. Jessup: CSR # 084-004343
Area Wide Reporting and Video Conferencing
301 West White Street
Champaign, Illinois 61820
(800) 747-6789

INDEX

APPEARANCES:

For the Plaintiff:

Mr. Eugene Miler
US ATTORNEY
201 South Vine Street
Urbana, Illinois 61801

For the Defendant:

Mr. John C. Taylor
FEDERAL PUBLIC DEFENDER
300 W. Main St.
Urbana, Illinois 61801

[3] THE COURT: This is the United States of America vs. Edward Dorsey, Senior, Case No. 09-20003. Present in open court is the Defendant Edward Dorsey, Senior, accompanied by his attorney John C. Taylor.

United States of America represented by its Assistant U.S. Attorney Mr. Miller. Who accompanies you at counsel table today?

MR. MILLER: This is Special Agent Jeffrey Martin of the Kankakee Area Metropolitan Enforcement Group.

THE COURT: He is the case agent?

MR. MILLER: Yes.

THE COURT: Also present is Donna Brown, probation officer for the Central District of Illinois, Urbana division.

In this case on January 7, 2009, a one count indictment was filed in the United States District Court charging that on or about August 6, 2008 in Kankakee County in the Central District of Illinois, the Defendant Edward Dorsey, Senior, possessed five grams or more of cocaine based crack.

On April 20, 2009, the Government filed an information concerning prior convictions giving notice to the Defendant that pursuant to 21 U.S. Code [4] Section 851 the Defendant would be subject to enhanced penalties based on his prior felony convictions of unlawful possession of a controlled substance in

Kankakee County Circuit Court Case No. 92-CF-44 and unlawful possession of a controlled substance with the intent to deliver, Kankakee County Circuit Court Case No. 04-CF-108.

On June 3, 2010, Mr. Dorsey appeared in court and entered a plea of guilty to the matter in the indictment. It was without a written plea agreement.

He accepted responsibility in the colloquy with Judge Bernthal. Judge Bernthal found the plea to be freely, voluntarily, knowingly, intelligently made that the Defendant acknowledged the elements of the offense, the factual basis for the offense and said he was pleading guilty because he was in fact guilty.

Judge Bernthal recommended that I accept the plea. I did accept the plea, entered judgment of conviction, ordered probation to prepare a presentence investigation report which Mrs. Brown has completed.

Mrs. Brown, how did you transmit the presentence report and revisions to the parties and to Mr. Dorsey?

MRS. BROWN: Your Honor, I e-mailed it to the [5] attorneys and I sent it by U.S. Mail to the Defendant.

THE COURT: And Mr. Taylor, you have – I mean, Mr. Miller, first, Mr. Miller you have received and reviewed the presentence report?

MR. MILLER: Yes, Your Honor.

THE COURT: Mrs. Brown reports that you have made no objections to the presentence report; is that correct?

MR. MILLER: That is, Your Honor.

THE COURT: She said you did that on August 13; is that correct?

MR. MILLER: Yes, Your Honor.

THE COURT: Do you have any objections today?

MR. MILLER: No.

THE COURT: Will the Government be calling any witnesses in aggravation?

MR. MILLER: No.

THE COURT: Mr. Taylor, Mrs. Brown reports that on August 2, 2010, you advised you had no objections to the presentence report but at Mr. Dorsey's request a modification was made to the report. Is she correct in that report to me?

MR. TAYLOR: She is, Your Honor.

THE COURT: So you have received and reviewed [6] the presentence report with revisions?

MR. TAYLOR: I have, Your Honor.

THE COURT: Was the modification Mr. Dorsey made, was that requested, was that modification made?

MR. TAYLOR: It was, Your Honor.

THE COURT: Did you advise Mr. Dorsey that you had no objections to the presentence report or revised report?

MR. TAYLOR: I did, Your Honor.

THE COURT: Did Mr. Dorsey acknowledge to you that he had received the presentence report?

MR. TAYLOR: He did, Your Honor.

THE COURT: And had he reviewed it?

MR. TAYLOR: Yes.

THE COURT: And did he discuss it with you?

MR. TAYLOR: He did, Your Honor.

THE COURT: And did he indicate a modification that you sought to be changed?

MR. TAYLOR: He did, Your Honor. That was changed. May I add?

THE COURT: Yes.

MR. TAYLOR: And just to make consistent and this is my fault, Mrs. Brown also modified by delineation one minor thing on the page today which we [7] will present to the Court later. It is just a, to make consistent with the modification we made pursuant to my client's request, Your Honor.

THE COURT: So there are no objections as far as you are concerned?

MR. TAYLOR: Yes, Your Honor.

THE COURT: And did Mr. Dorsey in the end have any objections that you are aware of?

MR. TAYLOR: No, Your Honor.

THE COURT: Mr. Dorsey, did you in fact receive the presentence report and revised report by U.S. Mail?

MR. DORSEY: Yes.

THE COURT: Did you have a chance to review it?

MR. DORSEY: Yes.

THE COURT: And did you discuss it with Mr. Taylor?

MR. DORSEY: Yes, I did.

THE COURT: He has indicated you asked for a modification to be made. Was that modification made in the revised report?

MR. DORSEY: Yes, it was.

THE COURT: Do you have any objections to the [8] presentence report or revised report that you want the Court to hear today?

MR. DORSEY: No.

THE COURT: Did anybody force you to say that?

MR. DORSEY: No.

THE COURT: Threaten you in any way?

MR. DORSEY: No.

THE COURT: Promise you anything to get you to indicate that you had no objections?

MR. DORSEY: No.

MRS. BROWN: Your Honor, if it is acceptable, what I will do is I will revise face sheet. What we are changing is the release status. I want to make sure the BOP gets the correct information. So what I would like to do is –

THE COURT: What is the release status that needs to be made on the face sheet?

MRS. BROWN: It should read August 6, 2008, arrested and detained in federal custody. And then the next line –

THE COURT: So and detained in federal custody. So return to IDOC and parole violation are stricken?

[9] MRS. BROWN: That is correct.

THE COURT: Let me do this on the face. Sometimes if it doesn't get done, people will see it in my green ink and modification. Arrested and detained

in federal custody is what appears after August 6, 2008?

MRS. BROWN: It should be after the date it should be remains detained –

THE COURT: Now you just lost me. What date are we talking about?

MRS. BROWN: January 9, 2009.

THE COURT: Let me get August 6, 2008 complete. Arrested and detained in federal custody is the way August 6, 2008 should read?

MRS. BROWN: That is correct.

THE COURT: I am doing that by inter-lineation. I have struck return to IDOC parole violation. Now January 9, 2009 should read –

MRS. BROWN: Remains detained in federal custody.

THE COURT: Okay.

MR. MILLER: Your Honor, I guess I hadn't – the Defendant, and again we want the information to be correct, but hearing this he was indicted federally in [10] January 7 of 2009.

And he was then a requisition for him to come over here because he was in the Illinois Department of Corrections.

I don't believe, again maybe it is a term of art but I don't believe he ever appeared in front of a federal judge until January of 2009.

So I am not sure of the basis for saying he was detained in federal custody in August of 2008. But those recordings are records and I just don't want the record to be incorrect.

THE COURT: Mrs. Brown, what would be the August 6, 2008 detention? What would that pertain to?

MRS. BROWN: Your Honor, I think probably before we change it, I should really get the information from Kankakee County. I was going based on what the Defendant had instructed me.

THE COURT: I will leave the release status to be modified by probation on the face sheet since it doesn't affect the statutory sentencing, it doesn't affect the advisory guidelines.

It is merely informational for the Bureau of Prisons. So it does not in any way inhibit the Court from proceeding today.

[11] But as to the face sheet we will leave the release status to be modified to reflect the public record in the U.S. District Court and Circuit Court of Kankakee County.

That modified face page release status would then after being prepared by Mrs. Brown would be

then forwarded to Mr. Miller for approval, forwarded to Mr. Taylor for approval.

If either side disputes the release status then the Court will hold a hearing solely on the correct language for release status but none of that affects sentencing.

There wasn't any words you could put down there that would in any way affect how I proceed on sentencing today since I really don't care what his release status is.

It is sort of like when somebody says I'm not a member of a gang. Well, I don't care whether you are or aren't but there are certain things that the Department of Corrections has in their records and the Bureau of Prisons has in their records and they go on to the Federal Bureau of Prisons.

Aliases, I don't care if his alias is Weasel or not. It is not affecting sentence. I don't care [12] what his tattoos are.

So we get into all kinds of arguments over things on the first two pages that I never even read until somebody makes me read them like today.

So if somebody says what is his release status, I don't know, he is here in court. He isn't released, he is here.

So for me in sentencing this is much ado about nothing. For the Bureau of Prisons, it is a statistic they want. So I will leave it up to Mr. Miller and Mr.

Taylor to agree on the first page and what it should say.

MR. MILLER: I am sure we will be able to agree on that.

THE COURT: I just want you to know, Mr. Dorsey, it doesn't affect today at all. It is just something that you want, Mr. Taylor wants, the Government wants, and probation to reflect whatever the public records are on August 6 of 2008 and January 9 of 2009. Now off the record.

(Discussion held off the record.)

THE COURT: The presentence investigation report as to the importance for me Page 3, Paragraph 1 through 80 prepared in accordance with the advisory [13] sentencing guidelines has been received and reviewed by the parties, by Mr. Dorsey, there are no objections to it.

The Court adopts it as the findings of fact on today's date by a preponderance of the evidence. Based on the advisory guidelines which is what we are required to do first by the 7th Circuit and other circuits is calculate as we always have, the guidelines.

Even though they are advisory, we do that first for advice and guidance even though the Defendant will ultimately be sentenced under 18 U.S. Code Section 3553(a).

Mr. Dorsey has an offense level of 22, criminal history Category 6 and faces under the statute ten

years to life. It is a mandatory minimum case based on his prior record.

So what would be a five-year case is enhanced to ten based on his prior convictions. He was previously advised of that and he is in this Court. So he faces ten years to life.

Probation is not authorized. A supervised release is not less than eight years. Community restitution applies. A fine range of up to 4 million [14] dollars if he has the ability to pay, a special assessment mandatory of \$100.

Mrs. Brown, is that the correct offense level, correct criminal history category and correct statutory provisions facing Mr. Dorsey?

MRS. BROWN: Yes.

THE COURT: Do you agree, Mr. Miller?

MR. MILLER: Yes.

THE COURT: Do you agree, Mr. Taylor?

MR. TAYLOR: Yes.

THE COURT: Normally someone with an offense level of 22, criminal history Category 6 would have an advisory imprisonment range of 84 to 105 months. Do you agree with that, Mrs. Brown?

MRS. BROWN: Yes.

THE COURT: However, Congress has mandated that in this case no federal judge can and will

give a sentence of less than 120 months because that is the statutory mandatory minimum. Do you agree, Mrs. Brown?

MRS. BROWN: Yes.

THE COURT: That then makes the guideline provisions 120 months, Mrs. Brown?

MRS. BROWN: That is correct.

THE COURT: So the guidelines are 120 months. [15] Probation is not authorized. Supervised release not less than eight years.

Community restitution applies, fine range 7500 to 4 million if Mr. Dorsey has the ability to pay. Mandatory special assessment imposed by Congress and by agreement in this case of \$100.

Are those the correct advisory guideline provisions facing Mr. Dorsey today, Mrs. Brown?

MRS. BROWN: Yes.

THE COURT: Mr. Miller, do you agree?

MR. MILLER: Yes.

THE COURT: Mr. Taylor, do you likewise agree?

MR. TAYLOR: Yes.

THE COURT: Mr. Taylor, will there be any witnesses that you will be calling today?

MR. TAYLOR: No, Your Honor. May I take a moment?

THE COURT: I do want to rule on your motion.

MR. TAYLOR: This would be a good day for the Court to chastise its public defender on the record for filing that after hours and for missing the front sheet of the PSR. So Your Honor, if you want to chastise me, go ahead.

THE COURT: No. In fact it was my staff. So [16] until you said it was filed after hours, it really wasn't because I was here until 7:00 last night but I did not have my computer on to pump this out but staff did first thing this morning.

So I note that last night at 5:06 you filed Docket No. 20, the sentencing memorandum pursuant to the Fair Sentencing Act of 2010 and objected to Mr. Dorsey being sentenced without consideration of the Fair Sentencing Act of 2010.

And the 2010 Sentencing Act was really signed by the President on August 3, 2010. And I am correct that you are filing this to preserve Mr. Dorsey's appeal rights in this case?

MR. TAYLOR: I am, Your Honor. Thank you.

THE COURT: And Mr. Dorsey, I have ruled on this many times before so I won't be spending a lot of time nor asking Mr. Taylor or Mr. Miller to respond but the way I see the Fair Sentencing Act, it means if

you committed a crime after August 3, 2010, committed the crime not that your case was proceeding, not that you hadn't been sentenced and would be sentenced, committed the crime.

And in this case the crime that you pled guilty to was August 6, same month three days after but [17] two years before the President signed the legislation.

So I have ruled in accordance with 7th Circuit Law that it doesn't relate back. The law is what it is when he signed it and it applies to people who commit crimes after, not people who committed crimes before, or in your case approximately two years before the law was signed and before Congress even introduced the legislation.

So I find that the Fair Sentencing Act does not apply in this case and the request that he be sentenced under the Fair Sentencing Act of 2010 is denied.

Court finds the mandatory minimum sentence is appropriate based on the law. So the Government will make a recommendation first, Mr. Dorsey. Mr. Taylor will make a recommendation second.

So you can show Docket 20 is denied. And then you will be given an opportunity to address the Court if you wish. You are not required to.

Mr. Miller, is there any cooperation in this case that would cause the Government to now make a motion under 18 U.S. Code Section 3553(e) asking the

Court to sentence Mr. Dorsey to less than the mandatory minimum?

[18] MR. MILLER: No, Your Honor.

THE COURT: You may be heard.

MR. MILLER: Thank you, Your Honor. As regards to the appropriate sentence in this case, the guidelines are below the mandatory minimum and therefore the United States is requesting the Court to issue what really is the minimum sentence and the only sentence that could be imposed or I should say the lowest sentence that could be imposed which is a sentence of ten years imprisonment in the Federal Bureau of Prisons, a sentence of 8 years supervised release following that sentence of imprisonment.

We don't disagree with the finding in the pre-sentence report that the Defendant does not have the ability to pay a fine so we do not ask for a fine to be imposed. We ask the Court to impose the \$100 special assessment.

I think it is appropriate to note that United States believes that even under Section 3553(a) without a mandatory minimum in this case even if the Fair Sentencing Act was applicable to this Defendant, we believe under these circumstances that ten years is an appropriate sentence.

And there is several reasons for that. First [19] of all, as we look at the guidelines although they are under the mandatory minimum with 16 criminal history points and a criminal history category of 6, an

argument would be made if there wasn't a mandatory minimum by the Government that his criminal history does underestimate his likelihood of recidivism as well as the seriousness of his criminal history with just a one level increase which is very common for this Court to enter for someone with 16 criminal history points, his range would be around 92 to 115 months which is very close to the 120 months mandatory minimum.

Additionally as we look at the Defendant's criminal record, he has besides a 1992 prior drug conviction, he received three separate convictions for which he received consecutive sentences; a felony possession which he received three years, criminal fortification of a residence involving storing controlled substances for which he received two years, and possession of a controlled substance for which he received four years.

As those are all put together, he has already received a nine-year sentence to the Illinois Department of Corrections.

So in this case an incremental increase of a [20] one year to a ten-year sentence for additional recidivism seems quite appropriate. And in fact when we look at his history, he was paroled from those three IDOC sentences in December of 2006. While he was on that parole, he committed another felony offense, felony possession of cannabis for which he received quite a break, 24 months probation and 180 days in jail and then -

THE COURT: That had to be in Kankakee.

MR. MILLER: It was, Your Honor. And while he was on parole and probation, four felony drug offenses, he committed this new offense in August of 2008.

So we do believe that the 10 year sentence although it is required by the mandatory minimum here would be the appropriate sentence.

If it would have turned out that the crack cocaine was less than 5 grams and if the Fair Sentencing Act applied, we still do believe that ten years is an appropriate sentence. Thank you, Your Honor.

THE COURT: Off the record.

(Discussion held off the record.)

THE COURT: So Mr. Taylor, you may address the Court.

[21] MR. TAYLOR: Your Honor, after Mr. Miller's statement about if there wasn't a mandatory minimum the criminal history would mandate in his opinion a higher guideline, this is a backhanded compliment I suppose.

It is a tribute to Mr. Miller's skills and his advocacy that he can take a criminal history and turn it into a death penalty case. So that is a compliment to Mr. Miller.

THE COURT: He could ask for an upper departure based on 16 criminal history points, criminal history Category 6 but he didn't do that.

MR. TAYLOR: That is right. Your Honor, you have heard me say this before and Mr. Miller has heard me say this before but my client hasn't heard it before.

The coal black record of a probation report which by the way ably prepared by Mrs. Brown as always, really doesn't tell us anything about the character of a client.

There is only one person in this courtroom who ever knows the character of a client, Your Honor, and that is me because I spend time with them. I sit in the jail cells with them.

And what we see in the probation report and I [22] want my client to know, Your Honor, this is not gratuitous, I don't say this just to make him feel happy.

It is rare in this courtroom where I say anything good about the character of my client. Well, I am about Edward. He has been a gentleman. He has been easy to work with. He has been polite. He has been respectful.

That is rare in federal court, Your Honor, and I consider the way you treat your public defender, Your Honor, is pretty indicative of your character and Edward has been really just a great client.

I also want to note, Your Honor, that even though he had a young child that he fathered in high school, he struggled and completed regular high school, not a GED, Your Honor, at St. Anne's.

I also note, Your Honor, and I know that this is the minority view in this federal courthouse. In fact maybe I am the only person that holds this view in the federal courthouse.

Early on Edward was given the opportunity to cooperate. It would have allowed him to get his sentence below 10 years, possibly substantially.

Edward is one of those rare people who tell [23] me I am not going to cooperate. I did what I did. I am not going to bring somebody else down just to get a lighter sentence.

And Your Honor, I know a lot of people think well, you are stupid not to cooperate. I don't believe that way. I believe again it is a showing of character that Edward manned up, took his responsibility and is moving on. And I think that is indicative of the character of Edward Dorsey.

That is really all I have to say, Your Honor. It is a statutory minimum mandatory case. I just recommend to you Edward is one of the better people we get in this courthouse. Thank you, Your Honor.

THE COURT: Mr. Dorsey, you are not required to say anything but if you do and wish to, you may join Mr. Taylor at the podium but it will be your choice.

MR. TAYLOR: He has indicated no, Your Honor. Thank you.

THE COURT: Thank you, Mr. Dorsey. The Court notes for the record he was shaking his head no and Mr. Taylor, you already knew he was not going to allocute, right?

MR. TAYLOR: Yes, Your Honor.

THE COURT: He has had the opportunity and he [24] has chosen no. Mr. Dorsey, I did criminal defense. I was never a prosecutor. So I understand exactly what Mr. Taylor said and I understand it. And so I certainly don't hold that against you.

You are now in federal court. You will never be in Kankakee County Circuit Court again. Well, maybe on a traffic ticket or juvenile but you are not a juvenile.

But Mr. Miller, with criminal history Category 6, his prior convictions, where does Mr. Dorsey go on his next drug case if it is 50 grams or more of crack? Congress hasn't changed that mandatory minimum, have they?

MR. MILLER: They raised the threshold for crack to 280 grams. If it is more than 280 grams of crack, he would face mandatory life imprisonment.

THE COURT: What about the next step to 20 or career offender?

MR. MILLER: He would go right past the 20 to life, Your Honor, if it was more than 280. But he could be classified as a career offender, Your Honor, if he returned depending on the, how some of the other convictions were classified.

But this would certainly classify as a [25] qualifying conviction as a career offender if he just was involved with more than 28 grams of crack.

THE COURT: So on the street the smart ones never do more than 50 grams. Now they have to adjust and not do more than 28; is that correct?

MR. MILLER: Correct.

THE COURT: And if he does under 28 and continues to do a 5 gram business, what does he look at the next time he comes to federal court? Ten or more?

MR. MILLER: If he was a career offender even without the threshold it would be about 188 to 235 so about 15 to 20.

THE COURT: Just doing a 5 gram business.

MR. MILLER: Or less.

THE COURT: The reason I am doing this, Edward, as a criminal defense lawyer the 13 years I spent doing that, I used to tell my clients what do you do if you continue in this business.

And then I would give them that advice. I thought that they needed the advice to understand when they got out if they continued whether it was burglary, I don't get burglary cases in federal court, but burglary, armed robbery, drugs, just give them the advice.

[26] So you are now in the major leagues. You are now in federal court. You will always be in federal

court. And you are going to be in your 40's when you get out having appropriately about 30 years ahead of you.

So in the future you have been advised they are not going to eliminate drug laws. They are not going to make it legal. President Obama is not going to do that. It is not going to happen. They are still going to have mandatory minimums.

And for the way it appears to me, Mr. Taylor, next time he comes here with a federal drug offense, he is a career offender, right?

MR. MILLER: That is correct.

THE COURT: That is 180 months?

MR. MILLER: 260 to -

THE COURT: If it is 280 grams or more, it is life. So I wanted to make sure that you got that advice so you can determine how you wish to live after released from the Bureau of Prisons.

You are a lucky man. I don't look at the last page in a presentence report until I get there. So if I am reading this criminal history, first I am fascinated that you ever got a Department of [27] Corrections sentence out of Kankakee but you did.

I wasn't surprised that you could violate parole and not get sent back to prison. I do know that if you violate driving up there, they give you 30 days. I know that they send people to jail for driving offenses.

But this isn't Kankakee anymore. And you need to tell all of your friends and relatives that doing business in Kankakee County might be good until you get to federal court but you will never be in county court again.

And ten years is not an excessive sentence. If I was a state court judge and I was and I did sit in felony court and I did sit in the state appellate court and I looked at somebody with a criminal history of 16 points and criminal history Category 6, continuing drug offenses, ten years is not an unreasonable sentence period end.

So here the advisory guidelines may have said less than ten years. The statute says ten years. Look at the factors under 18 U.S.C. 3553(a): Reflect the seriousness of the offense. Yes, you have been a drug dealer for a long time.

Promote respect for the law. Yes, it is the [28] law. And President Obama is not changing that law on drugs as far as repetitive drug dealers. Career offenders, mandatory minimums. Does it provide just punishment. Yes, you are being treated the same as others.

For adequate deterrence, that I don't know. That will be your choice. Protect the public from further crimes. For at least 85 percent of ten years you won't be selling drugs.

Will it offer opportunities for rehabilitation. I think so. I think you will have an opportunity to work, learn skills, take advantage of it.

Will it ensure consistent fair determinate proportional sentences. Absolutely. You are treated the same as all other people in your situation wherever they are in the United States with a mandatory minimum sentence of ten years which the Court finds is appropriate and reasonable, not greater than necessary after considering the nature and circumstances of the offense and the character and history which is well documented in the presentence report.

Therefore pursuant to the Sentencing Reform Act of 1984, the Defendant Edward Dorsey, Sr., is [29] hereby committed to custody of the Federal Bureau of Prisons for a period of 120 months. It is recommended that he serve his sentence in a facility as close to his family in Kankakee County, Illinois as possible.

Further recommend that he serve his sentence in a facility that will allow him to participate in the residential drug abuse program and maximize his exposure to educational and vocational opportunities.

Court finds the Defendant does not have the ability to pay a fine and no fine is imposed. Following your release from custody, you will serve an eight-year term on supervised release.

Within 72 hours of your release from custody from the Bureau of Prisons, you will report in person

to the probation office in the district to which you are released.

While on supervised release, you will not commit another federal, state or local crime. You will not possess a controlled substance.

You will submit to one drug test within 15 days of release of your imprisonment. Two drug tests thereafter. You will cooperate in the collection of DNA as directed by the probation office of the Bureau of Prisons.

[30] You will refrain during the period of supervised release for that eight-year period from the use of alcohol, do not possess, use, distribute or administer a controlled substance, paraphernalia related to a controlled substance except as prescribed by a physician.

You shall at the direction of the probation office participate in a program for substance abuse treatment including not more than six tests per month to determine whether you abuse controlled substances and/or alcohol.

Shall pay for these services as directed by the probation office. You shall not own, purchase or possess a firearm, ammunition or other dangerous weapon.

Special assessment of \$100 is imposed pursuant to the statute. You do have the right to appeal the findings, judgment and sentence of this Court.

The fact that it is a mandatory minimum sentence imposed by Congress does not keep you from appealing if you wish.

You can do that in one of three ways. And also you can appeal my determination that you are not [31] to be sentenced under the Fair Sentencing Act.

One, you can file your notice of appeal with the clerk of the court here at the courthouse in Urbana.

Two, you can file a request to have the clerk of the court file a notice of appeal on your behalf. Or three, you can make Mr. Taylor, you can request him and ask him to file a notice of appeal on your behalf.

Any of those three methods must be done in the next ten days to perfect your appeal rights. If you do nothing, your appeal rights are waived following ten days.

If a notice of appeal is filed, your case will proceed to the 7th Circuit Court of Appeals in Chicago. They will appoint an attorney to represent you free of charge. Do you have any questions, Mr. Dorsey?

MR. DORSEY: No.

THE COURT: Anything further, Mrs. Brown?

MRS. BROWN: No.

THE COURT: Anything further, Mr. Miller?

MR. MILLER: No.

THE COURT: Anything further, Mr. Taylor?

MR. TAYLOR: Would the Court please direct [32] the clerk to file those?

THE COURT: We will direct the clerk to file a notice of appeal. Thank you. The Defendant is remanded into the custody of marshals to be sent to the Bureau of Prisons. He receives credit for time served.

[Reporter's Certification Omitted In Printing]

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES
OF AMERICA

V.

EDWARD DORSEY, SR

**JUDGMENT IN A
CRIMINAL CASE**

(Filed Sep. 13, 2010)

Case Number:
09-20003-001

USM Number: 14905-026

John C. Taylor

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) _____
after a plea of not guilty.

The defendants adjudicated guilty of these offenses:

| <u>Title & Section</u> | <u>Nature of Offense</u> | <u>Offense Ended</u> | <u>Count</u> |
|---|--|--------------------------|--------------|
| 21 USC §841(a)(1) and (b)(1)(B)(iii) | Possession of 5 Grams or More of Cocaine Base (Crack) With Intent to Distribute | 8/6/2008 | 1 |

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s)

Count(s) _____

is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/10/2010

Date of Imposition of Judgment

/s/ Michael P. McCuskey

Signature of Judge

MICHAEL P. McCUSKEY

Chief U.S. District Judge

Name and Title of Judge

9/13/10

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months.

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant serve his sentence in a facility as close to his family in Kankakee County, Illinois, as possible. It is further recommended that he serve his sentence in a facility that will allow him to participate in the Residential Drug Abuse Program and maximize his exposure to educational and vocational opportunities.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall
be on supervised release for a term of:
eight (8) years.

The defendant must report to the probation office
in the district to which the defendant is released
within 72 hours of release from the custody of the
Bureau of Prisons.

The defendant shall not commit another federal, state
or local crime.

The defendant shall not unlawfully possess a con-
trolled substance. The defendant shall refrain from
any unlawful use of a controlled substance. The de-
fendant shall submit to one drug test within 15 days
of release from imprisonment and two periodic drug
tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive any use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not

associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. You shall refrain from any use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician. You shall, at the direction of the probation officer, participate in a program for substance abuse treatment, including not more than six tests per month to determine whether you have

used controlled substances and/or alcohol. You shall pay for these services as directed by the probation office.

2. You shall not own, purchase, or possess a firearm, ammunition, or other dangerous weapon.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

| | <u>Assessment</u> | <u>Fine</u> | <u>Restitution</u> |
|---------------|-------------------|-------------|--------------------|
| TOTALS | \$ 100 | \$ 0.00 | \$ 0.00 |

- The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

| <u>Name of Payee</u> | <u>Total Loss*</u> | <u>Restitution Ordered</u> | <u>Priority or Percentage</u> |
|----------------------|--------------------|----------------------------|-------------------------------|
| TOTALS | \$ <u>0.00</u> | \$ <u>0.00</u> | |

- Restitution amount ordered pursuant to plea agreement \$ _____
- The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the
 - fine restitution.
 - the interest requirement for the fine
 - restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of \$ 100.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order:
(1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

635 F.3d 336

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Anthony FISHER, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Edward Dorsey, Sr., Defendant-Appellant.

Nos. 10-2352, 10-3124.

Argued Feb. 15, 2011.
Decided March 11, 2011.

Jonathan H. Koenig (argued), Attorney, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee in No. 10-2352.

Daniel T. Hansmeier (argued), Attorney, Office of the Federal Public Defender, Springfield, IL, Richard H. Parsons, Attorney, Office of the Federal Public Defender, Peoria, IL, for Defendant-Appellant in No. 10-2352.

Anthony Fisher, Oklahoma City, OK, Pro Se.

Jonathan H. Koenig (argued), Attorney, Office of the United States Attorney, Milwaukee, WI, Joseph H. Hartzler, Attorney, Office of the United States Attorney, Springfield, IL, for Plaintiff-Appellee in No. 10-3124.

Daniel T. Hansmeier (argued), Attorney, Office of the Federal Public Defender, Springfield, IL, John C. Taylor, Attorney, William C. Zukosky, Attorney,

Office of the Federal Public Defender, Urbana, IL, for Defendant-Appellant in No. 10-3124.

Edward Dorsey, Sr., Pekin, IL, Pro Se.

Before ROVNER, WOOD, and EVANS, Circuit Judges.

EVANS, Circuit Judge.

The Fair Sentencing Act of 2010 (FSA) might benefit from a slight name change: The Not Quite as Fair as it could be Sentencing Act of 2010 (NQFSA) would be a bit more descriptive. But whether the FSA should be amended to more closely resemble its name is a matter for Congress. We can do nothing about it at this time.

The FSA increased the drug quantities necessary to trigger mandatory minimum sentences under the Controlled Substances Act and the Controlled Substances Import and Export Act. Prior to the effective date (August 3, 2010) of the FSA, the amount of cocaine necessary to bring the mandatory minimum sentences into play was based on what is now viewed as the flawed 100:1 ratio of crack vs. powder cocaine. For crack cocaine, the FSA increased the amount from 5 to 28 grams for activating the five-year mandatory minimum term. For the ten-year mandatory minimum, the threshold amount jumped from 50 to 280 grams. But the problem, from the point of view of the two defendants in this case, is that the FSA is not retroactive. It applies only to defendants who are sentenced based on conduct that took place after August 3, 2010.

Anthony Fisher pled guilty in Wisconsin, in February 2010, to one count of conspiracy to distribute crack. A presentence report stated that he was responsible for between 150 and 500 grams of crack. It recommended a 140 to 175 months guideline range. Fisher disputed this, claiming he was responsible for only 50 to 150 grams of crack and the proper guideline range was 120 to 150 months. The district judge declined to resolve the quantity dispute and sentenced Fisher to the 120-month mandatory minimum based on 50 or more grams of crack. Judgment was entered on June 2, 2010. Fisher filed a notice of appeal the next day.

Fisher claims that the FSA should apply because his appeal was pending on August 3, 2010, when the Act went into effect. Fisher asks us to apply the FSA retroactively to his sentence. However, as he acknowledged at oral argument, his case falls squarely within the ambit of our recent opinion in *United States v. Bell*, 624 F.3d 803 (7th Cir.2010). In *Bell*, we were also dealing with a defendant who had been convicted and sentenced and had an appeal pending when the FSA went into effect. We found that the general federal savings statute, 1 U.S.C. § 109, applies to the FSA and prevents it from operating retroactively. 624 F.3d at 815.

Fisher asks us to rethink *Bell*. However, he makes this suggestion based not on case law, but on his own suggested interpretations of the FSA and the application of the savings statute thereto. We are not persuaded and decline to stray from our recent precedent

in *Bell*. We further note that our sister circuits have likewise found that the savings statute bars retroactive application of the FSA. See *United States v. Gomes*, 621 F.3d 1343, 1346 (11th Cir.2010); *United States v. Carradine*, 621 F.3d 575, 580 (6th Cir.2010).

The appeal of our other defendant, Edward Dorsey, presents a slight wrinkle because he was sentenced after the FSA went into effect. On June 3, 2010, Dorsey pled guilty to possessing 5.5 grams of crack cocaine with intent to distribute, in Kankakee, Illinois, on August 6, 2008. Because he had a prior felony drug conviction, the mandatory minimum 10-year term was in play. Under the FSA, however, Dorsey would have had to possess at least 28 grams of crack in addition to the prior felony drug conviction to trigger the 10-year mandatory minimum. Dorsey was sentenced on September 10, 2010. At sentencing, the district judge declined to apply the FSA to Dorsey's case, saying, "in this case the crime that you pled guilty to was . . . two years before the President signed the legislation." Dorsey was sentenced to 120 months.

Dorsey argues that, even if the savings statute prevents retroactive application of the FSA, the relevant date for a retroactivity analysis is the date of sentencing, not the date of the commission of the criminal act, and therefore the FSA should have applied to him. Dorsey suggests that, in keeping with congressional intent and for reasons of fairness, we should distinguish someone in his situation from that

of the defendant in *Bell*, and apply the FSA to all defendants sentenced after August 3, 2010.

In *Bell* we held that the savings statute prevents the FSA from “operating retroactively absent any indication from Congress. And since the FSA does not contain as much as a hint that Congress intended it to apply retroactively,” we declined to apply it to Mr. Bell. 624 F.3d at 815. But Dorsey argues, rather creatively, that when considering applicability of a savings statute, we will apply the statute and deny retroactivity unless Congress suggests otherwise either by “express declaration or necessary implication.” *Great Northern Railway Co. v. United States*, 208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908). Dorsey then suggests that, although there is no express declaration here, there is necessary implication that the FSA must be applied retroactively – at least as to sentences imposed after August 3, 2010, regardless of when the criminal conduct took place.

Specifically, Dorsey points to the fact that the FSA expressly urged the Sentencing Commission to amend the guidelines on an emergency basis, and required the amendments to be adopted by November 1, 2010. He argues that this is evidence of the implicit will of Congress that the FSA be as speedily and widely implemented as possible. Further, he points to statements of various legislators urging the adoption of the FSA as the means to correct the long-standing unfairness in crack cocaine sentences, and urging the application of the FSA to all defendants who had not been sentenced as of passage of the FSA, regardless

of whether their criminal conduct occurred before this date.

In weighing this as potential evidence of a necessary implication that Congress wanted the FSA to be applied retroactively, we are mindful of the pitfalls of relying on legislative history. Although we may look for statements which can "plausibly be read as reflecting any general agreement," *Landgraf v. USI Film Products*, 511 U.S. 244, 262, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), cherry-picked statements made by proponents of the legislation cannot be relied upon as indications of the will of Congress.

Debate surrounding the crack cocaine sentencing scheme and the infamous "100:1 ratio" has been raging for years, and there is strong rhetoric to be found on either side. The FSA is compromise legislation and must be viewed as such. Given the long-standing debate surrounding, and high-level congressional awareness of, this issue, we hesitate to read in by implication anything not obvious in the text of the FSA. We believe that if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the Sentencing Commission. In other words, if Congress wanted retroactive application of the FSA, it would have said so.

Given the absence of any direct statement or necessary implication to the contrary, we reaffirm our

finding that the FSA does not apply retroactively, and further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing.

We have sympathy for the two defendants here, who lost on a temporal roll of the cosmic dice and were sentenced under a structure which has now been recognized as unfair. However, “[p]unishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds.” *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 664, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974).

We close with one final observation. Because crack cocaine quantity is viewed as a sentencing factor rather than a charged element of the offense, it is possible that a defendant could be convicted for conduct taking place both before and after August 3, 2010. Were this the case, any conduct committed after August 3, 2010 would necessarily be considered within the confines of the FSA. But Dorsey’s sentence was based entirely on conduct that occurred two years prior to August 3, 2010. He can, therefore, not get the kind of relief that may be available to a defendant whose criminal conduct straddles August 3, 2010. A future defendant in that situation may very well be able to benefit, at least in part, from the FSA.

For these reasons, the judgments as to Fisher and Dorsey are AFFIRMED.

646 F.3d 429

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.

Anthony FISHER, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.

Edward Dorsey, Sr., Defendant-Appellant.

Nos. 10-2352, 10-3124.

May 25, 2011.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:08-cr-00161 – Lynn Adelman, Judge.

Appeal from the United States District Court for the Central District of Illinois. No. 2:09-cr-20003 – Michael P. McCuskey, Chief Judge.

Jonathan H. Koenig, Attorney, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee in No. 10-2352.

Daniel T. Hansmeier, Attorney, Office of the Federal Public Defender, Springfield, IL, Richard H. Parsons, Attorney, Office of the Federal Public Defender, Peoria, IL, for Defendant-Appellant in No. 10-2352.

Anthony Fisher, Oklahoma City, OK, pro se in No. 10-2352.

Linda L. Mullen, Attorney, Office of the United States Attorney, Rock Island, IL, for Plaintiff-Appellee in No. 10-3124.

Daniel T. Hansmeier, Attorney, Office of the Federal Public Defender, Springfield, IL, John C. Taylor and William C. Zukosky, Attorneys, Office of the Federal Public Defender, Urbana, IL, for Defendant-Appellant in No. 10-3124.

Edward Dorsey, Sr., Pekin, IL, pro se in No. 10-3124.

Before ROVNER, WOOD, and EVANS, Circuit Judges.

PER CURIAM.

On March 23, 2011, the defendants-appellants Anthony Fisher (# 10-2352) and Edward Dorsey (# 10-3124) filed petitions for rehearing and rehearing en banc. The panel has voted to deny the petitions for rehearing. On April 5, 2011, an order was issued directing the government to file an answer to the petition for rehearing en banc filed by Edward Dorsey. The answer was filed on April 19, 2011. Subsequently, a vote was taken on the petition for rehearing en banc in appeal # 10-3124. Chief Judge Easterbrook and Circuit Judges Posner, Flaum, Kanne, Rovner, Wood, Sykes and Tinder voted to deny the petition. Circuit Judges Williams and Hamilton voted to grant the petition.

Therefore, the petitions for rehearing and rehearing en banc filed on March 23, 2011 are denied.

WILLIAMS, Circuit Judge, with whom HAMILTON, Circuit Judge, joins, dissenting from the denial of rehearing en banc.

Edward Dorsey pled guilty to distribution of 5.5 grams of crack cocaine for conduct that occurred prior to the passage of the Fair Sentencing Act of 2010 (“FSA”). He was sentenced on September 10, 2010, after its enactment. The panel found that under the General Saving Statute, 1 U.S.C. § 109, the FSA was not “retroactive” to those whose sentences were pending at the time of the FSA’s enactment, and that the relevant date for application of the FSA is the date of conduct. *United States v. Fisher*, 635 F.3d 336, 340 (7th Cir.2011). Like many of the district courts currently addressing this issue around the country, I would find that the General Saving Statute cannot be read to preclude the application of the FSA to individuals in Dorsey’s position.

We are the first circuit to address the question of whether individuals sentenced *after* the enactment of the FSA are entitled to the benefit of the statute. Given the five-year statute of limitations for offenses such as the one at issue, *see* 18 U.S.C. § 3282, adhering to a flawed view concerning the application of the General Saving Statute will require the district courts to continue administering sentences that have been acknowledged by Congress as unjust. While the number of people indicted for pre-FSA conduct will diminish over time, in fiscal year 2010, at least 78.8% of defendants sentenced for crack-cocaine offenses were sentenced for conduct involving five grams or more of the drug. United States Sentencing Commission 2010 Sourcebook of Federal Sentencing Statistics Tab 43.

I.

The General Saving Statute provides that “[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide.” 1 U.S.C. § 109. The Supreme Court has said that the saving statute “cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment.” *Great No. Ry. Co. v. United States*, 208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908). In other words, where there is a “specific directive” that “can be said by fair implication or expressly to conflict with § 109,” “there [would] be reason to hold that [the new statute] superseded § 109.” *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n. 10, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974) (citing *Great No. Ry. Co.*, 208 U.S. at 465-66, 28 S.Ct. 313). The General Saving Statute does not apply in instances where, by “necessary implication, arising from the terms of the law as a whole,” it is clear that “the legislative mind will be set at naught by giving effect to the [saving statute].” *Great No. Ry. Co.*, 208 U.S. at 465, 28 S.Ct. 313; *see also Hertz v. Woodman*, 218 U.S. 205, 217, 30 S.Ct. 621, 54 L.Ed. 1001 (1910) (stating that the General Saving Statute is a “rule of construction . . . to be read and construed as part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress”). “A subsequent Congress . . . may exempt itself from such requirements by ‘fair implication’ – that is, *without*

an express statement.” *Lockhart v. United States*, 546 U.S. 142, 148, 126 S.Ct. 699, 163 L.Ed.2d 557 (2005) (Scalia, J., concurring) (emphasis in original) (citing *Marrero*, 417 U.S. at 659-60 n. 10, 94 S.Ct. 2532; *Hertz*, 218 U.S. at 218, 30 S.Ct. 621).

There is no need to “cherry pick,” as the panel’s opinion suggests, from the legislative history to find the necessary directive here since it is found in the language of the FSA itself. In section 8 of the FSA, Congress directed the United States Sentencing Commission (“USSC”) to exercise “emergency authority,” and stated that the USSC “shall . . . promulgate the guidelines, policy statements, or amendments provided in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act . . . and . . . make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.” 124 Stat. 2372, 2374 (2010). The USSC followed this directive and promulgated a temporary, emergency amendment to the sentencing guidelines consistent with the FSA on November 1, 2010, which became applicable to all defendants sentenced after that date, regardless of when they committed their crimes. See 18 U.S.C. § 3553(a)(4)(A)(ii) (stating that except in cases of remand, sentencing courts are to apply the guidelines “in effect on the date the defendant is sentenced”). Many district courts have found that this statutory directive is sufficient indication of Congress’s intent to have the FSA apply to those

individuals yet to be sentenced. *See, e.g., United States v. Watts*, 775 F.Supp.2d 263, 275, 2011 WL 1282542, at *11 (D.Mass.2011) (collecting cases); *see also United States v. Douglas*, 746 F.Supp.2d 220 (D.Me.2010).

The panel recognized this argument, but then stated that Congress “could have dropped a hint” that it sought to apply the FSA to pending cases “in its charge to the Sentencing Commission.” I see no hint that Congress intended otherwise. In that very charge, in fact, Congress ordered the USSC to exercise emergency powers to conform the guidelines to the FSA “as soon as practicable,” and no later than ninety days, instead of waiting for the Commission to promulgate new guidelines under existing procedures.¹ When the FSA was enacted, Congress was undoubtedly aware of the default rule of applying amended guidelines to pending cases, which would require the application of a new 18:1 guideline ratio regardless of when the violation occurred. Section 8 of the FSA sought to promote “consistency” between the guidelines and the statute, which signals an intent to apply the FSA to pending cases just as the guidelines would be. Under the panel’s interpretation, for many defendants currently being sentenced whose conduct

¹ The emergency amendments expire on November 1, 2011. 28 U.S.C. § 994(p); *Douglas*, 746 F.Supp.2d at 223 n. 17. On April 28, 2011, the Commission submitted to Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2011, unless Congress acts to the contrary. *See* 76 Fed.Reg. 24960 (May 3, 2011).

occurred before the FSA was enacted, the sentencing court would calculate an 18:1 guideline ratio, but would have to apply a statutory 100:1 ratio. Oddly, under the panel's interpretation, of these defendants, the only ones who benefit from this "emergency authority" are the worst offenders, whose new guidelines range would be reduced to the statutory minimum. Congress's mandate in section 8 would not have made much sense if Congress did not intend the FSA to apply to defendants in Dorsey's situation because, regardless of what the Commission promulgated, the new guidelines would simply look to the old statutory minimums.

The panel did not explain why section 8 does not provide a "fair implication" under the Supreme Court's elaboration of what is required to supersede the General Saving Statute. Some district courts have, however, attempted to narrow the "fair implication" or "necessary implication" language that finds its origins in *Great Northern*. See *United States v. Young*, 782 F.Supp.2d 450, 453-54, 2011 WL 1042264, at *4 (E.D.Mich.2011); see also *United States v. Santana*, 761 F.Supp.2d 131, 156-58, 2011 WL 260744, at *20 n. 23 (S.D.N.Y.2011). Contrary to what these courts have found, *Great Northern* does not stand for the proposition that a "direct contradiction" in the statute itself is required to find the fair or necessary implication sufficient to overcome the General Saving Statute.

In *Great Northern*, the Supreme Court held that certain language in the 1906 Hepburn Law repealing

an older statute did not “expressly or by fair implication, conflict with the general rule established by [the General Saving Statute],” 208 U.S. at 466, 28 S.Ct. 313, such that new prosecutions for old conduct were barred, because the language at issue did not touch upon new prosecutions.² The court’s view was “fortified” by a direct conflict between *another* provision of the Hepburn Law and the defendants’ contention that new prosecutions for pre-1906 conduct were abrogated by the new statute. *Id.* at 468, 28 S.Ct. 313. In other words, the defendants’ contention that prosecutions under the old law were abated by the Hepburn Law was directly contradicted by another provision of that same law. In contrast, in this case, there is no “other” provision of the FSA that directly contradicts with Dorsey’s position or warrants reading the FSA to prevent application of its terms to individuals yet to be sentenced. *Great Northern* simply does not support a narrowing of the “fair implication” language used by the Court. In fact, as noted above, the Supreme Court cases decided after *Great Northern* have continued to rely upon the “necessary” or “fair implication” language without mentioning the need for a “direct contradiction.” See *Marrero*, 417 U.S. at 659

² The Hepburn Law itself contained a saving provision stating that “all laws and parts of laws in conflict with the provisions of this act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.” *Great Northern*, 208 U.S. at 465, 28 S.Ct. 313.

n. 10, 94 S.Ct. 2532 (“But only if § 1103(a) can be said by fair implication or expressly to conflict with § 109 would there be reason to hold that § 1103(a) superseded § 109.”); *Lockhart*, 546 U.S. at 148, 126 S.Ct. 699 (Scalia, J., concurring) (“A subsequent Congress . . . may exempt itself from such requirements by ‘fair implication’ – that is, without an express statement.”). Furthermore, there is no indication that the “fair implication” analysis in *Great Northern* ought to be limited to statutes with their own saving provisions.

There is, therefore, little rationale for limiting the “fair implication” language found in *Great Northern*, and none for not considering section 8 of the FSA to be such an implication. The panel’s reading of section 8 would set “the legislative mind . . . at naught by giving effect to the [saving statute],” *Great No. Ry. Co.*, 208 U.S. at 465, 28 S.Ct. 313, and prevent the consistency and conformity that the statute expressly seeks. As one district judge has noted, “[i]t is only by covering his eyes and plugging his ears that any fairminded person could avoid the conclusion that Congress intended, by ‘fair implication,’ to treat the statutory amendments . . . the same way it directed the Guidelines to be treated, that is, to mandate that the amended statutes be applied to all defendants coming before federal courts for sentencing.” *Watts*, 775 F.Supp.2d at 278, 2011 WL 1282542, at *14; see also *Douglas*, 746 F.Supp.2d 220. I would therefore find that the Fair Sentencing Act is applicable to Dorsey as a result of section 8.

II.

Dorsey also argued that a defendant in his position “incurs” a penalty at the time of his sentencing, and not at the time of conduct, such that the Saving Statute would not even apply to the case at hand. I believe this issue warrants review by the full court.

Section 841’s elements are contained in subsection (a), while subsection (b) contains the considerations which determine the maximum and minimum sentence. 21 U.S.C. § 841; *United States v. Bjorkman*, 270 F.3d 482, 490 (7th Cir.2001). We have consistently held that in the § 841 context, “drug type and quantity are not elements of the offense”; rather, they are factors to be considered at sentencing. *Bjorkman*, 270 F.3d at 490 (rejecting argument after *Apprendi* that drug quantity is an element of the offense); *United States v. Gougis*, 432 F.3d 735, 745 (7th Cir.2005); *United States v. Martinez*, 301 F.3d 860, 865 (7th Cir.2002). “[A] statute that sets a mandatory minimum neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court’s discretion in selecting a penalty within the range available to it.” *United States v. Krieger*, 628 F.3d 857, 863 (7th Cir.2010) (quotation marks omitted); see also *Harris v. United States*, 536 U.S. 545, 567, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (sentencing factor that triggers mandatory minimum merely limits the court’s discretion in selecting penalty within statutory permissible range).

Under the panel's view, an individual could plead guilty to, or be convicted of, distribution of crack cocaine under § 841(a) for conduct occurring prior to August 2010, with no weight specified, but be subject to a statutory five-year mandatory minimum if the government proved at a later sentencing, by a preponderance of the evidence, that the weight of drugs involved in the charged conduct amounted to five grams, or ten years if the weight was shown to be fifty grams. *See, e.g., United States v. Rodriguez*, 67 F.3d 1312, 1324 (7th Cir.1995). The panel does not discuss the legal implications of this result. It only suggests that if a conviction is based on charged conduct that occurred both before and after the enactment date, the post-enactment conduct would have to be considered in light of the FSA. *Fisher*, 635 F.3d at 340. This, however, does not address why the penalty is "incurred" at the time of the commission of the charged offense under the statute, when that mandatory five or ten-year penalty can be based on evidence submitted solely at sentencing.³

³ In *United States v. Jackson*, 835 F.2d 1195 (7th Cir.1987), we upheld the life sentence of a defendant under 18 U.S.C. § 1202, which prohibited possession of weapons by career criminals, even though he had been sentenced after that statute's repeal by 18 U.S.C. §§ 922(g) and 924(e)(1). However, at that time, we held that the General Saving Statute applied because the latter legislation "simply altered the *elements* of the offense," *id.* at 1197 (emphasis added), and did not consider whether it would apply if a statute altered a sentencing factor.

The penalty “incurred” argument Dorsey raised is different from the one we addressed in *United States v. Bell*, 624 F.3d 803 (7th Cir.2010). In that case, the defendant argued that the statutory change in the FSA was procedural or remedial, and thus outside of the scope of the General Saving Statute. We found that “[n]o procedures or remedies were altered by the passage of the FSA,” and that “the FSA’s predominant purpose was to change the punishments associated with drug offenses.” *Bell*, 624 F.3d at 815. This, however, does not foreclose the argument that the penalty is not “incurred” until the date of sentencing.

Dorsey’s view that a penalty is “incurred” on the date of sentencing is in some tension with the way the Supreme Court has examined the term “prosecution” under specific statutory saving provisions, see, e.g., *Bradley v. United States*, 410 U.S. 605, 609, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973) (finding that under Drug Abuse Prevention and Control Act of 1970, “prosecution terminates only when sentence is imposed”); *Marrero*, 417 U.S. at 659, 94 S.Ct. 2532 (also addressing 1970 Act, and finding that defendants already sentenced were not entitled to subsequently enacted parole eligibility due to statutory saving clause and General Saving Statute), with how other circuits have read the General Saving Statute, see, e.g., *United States v. Smith*, 354 F.3d 171, 175 (2d Cir.2003) (noting that “sentencing is an integral part of the ‘prosecution’ of the accused, as that term is used in § 109, and therefore that § 109 saves sentencing provisions in addition to substantive laws”), and with

how the Supreme Court has addressed “retroactivity” with respect to a change in law while a case is on direct appeal, *see Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (not addressing the General Saving Statute, but finding that a “retroactivity” analysis in the context of the Civil Rights Act of 1991 focuses on whether a statute attaches new legal consequences to events completed before the statute’s enactment date). However, it is this tension, and the panel’s lack of reconciliation of that tension, that warrants the full court’s review.

For these reasons, I respectfully dissent from the denial of Dorsey’s petition for rehearing en banc.

2011 WL 3422126 (U.S.)

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Supreme Court of the United States
DORSEY, EDWARD V. UNITED STATES.

No. 11-5683.
Nov. 28, 2011.

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The case is consolidated and a total of one hour is allotted for oral argument.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 11-5683

In The
Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010 applies to all defendants sentenced on or after its enactment.

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BRIEF FOR PETITIONER

Mr. Dorsey respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand this case for resentencing under the Fair Sentencing Act of 2010.

OPINIONS BELOW

The opinion of the court of appeals affirming Mr. Dorsey's sentence is reported at 635 F.3d 336 (7th Cir. 2011). J.A. 96-102. The opinion denying rehearing en banc is reported at 646 F.3d 429 (7th Cir. 2011). J.A. 103-15. The district court did not issue a written opinion, but the sentencing transcript is reprinted in the joint appendix. J.A. 56-83.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 2011, and a timely petition for rehearing en banc was denied on May 25, 2011. J.A. 96-115. A timely petition for writ of certiorari was filed on August 1, 2011. This Court granted the petition on November 28, 2011. J.A. 116. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), full text set forth in Appendix C to the Petition for a writ of certiorari. Pet. App. C.

2. The saving statute, 1 U.S.C. § 109, provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT OF THE CASE

For some 25 years, federal cocaine sentencing laws have distinguished between cocaine in its base form and cocaine in its salt form. See *DePierre v. United States*, 131 S.Ct. 2225, 2227-28 (2011). Trafficking in

the former was punished much more harshly than trafficking in the latter. *Id.* at 2229. Congress recognized this unfairness with the passage of the Fair Sentencing Act of 2010. Pub. L. No. 111-220, 124 Stat. 2372 (2010). The issue in this case is whether the Fair Sentencing Act applies immediately, to all individuals sentenced after its enactment, or whether district courts must continue to sentence certain individuals under an unfair sentencing scheme.

I. Statutory Background

On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010. 124 Stat. 2372. The Act's stated purpose was to "restore fairness to Federal cocaine sentencing." *Id.* The Act used the term "restore" because it was not until 1986 that unfairness found its way into federal cocaine sentencing.

A. The Anti-Drug Abuse Act of 1986

"In 1986, increasing public concern over the dangers associated with illicit drugs – and the new phenomenon of crack cocaine in particular – prompted Congress to revise the penalties for criminal offenses involving cocaine-related substances." *DePierre*, 131 S.Ct. at 2229. After holding several hearings to address the emergence of crack cocaine, Congress enacted the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207 (1986). *Id.* The ADAA was premised on Congress' belief, at that time, that crack cocaine was significantly more dangerous than

powder cocaine because it was cheaper, more potent, more addictive, more harmful, more prevalent among teenagers, and associated with more violence. *See Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007).

As relevant here, the ADAA established various mandatory minimum sentences for cocaine-related drug offenses. In doing so, the ADAA differentiated between mixtures and substances containing “cocaine base,” which includes crack cocaine, and mixtures and substances containing coca leaves, cocaine, and cocaine salts (hereinafter “cocaine”). The ADAA established a 100-to-1 ratio between the two groups. For instance, trafficking in only 5 grams of cocaine base, compared to 500 grams of cocaine, triggered a 5-year mandatory minimum sentence. *Id.*; 21 U.S.C. § 841(b)(1)(B)(iii) (2009). Similarly, trafficking in 50 grams of cocaine base, compared to 5,000 grams of cocaine, triggered a 10-year mandatory minimum sentence. 21 U.S.C. § 841(b)(1)(A)(iii) (2009).

The penalties were even steeper if one had a prior felony drug conviction.¹ In that case, trafficking in only 5 grams of cocaine base, compared to 500 grams of cocaine, triggered a 10-year mandatory minimum sentence, while trafficking in 50 grams of cocaine base, compared to 5,000 grams of cocaine,

¹ The enhanced penalties apply only if the government files a proper notice pursuant to 21 U.S.C. § 851.

triggered a 20-year mandatory minimum sentence, or a sentence of life imprisonment if the defendant had two prior felony drug convictions.² 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii) (2009).

Practically speaking, this 100-to-1 ratio primarily applied to punish those who trafficked in crack cocaine far more harshly than those who trafficked in powder cocaine. See United States Sentencing Commission: Report to Congress: Cocaine and Federal Sentencing Policy (2007). This is so despite the fact that crack cocaine and powder cocaine, “two forms of the same drug,” are “chemically similar,” with the identical active ingredient and “the same physiological and psychotropic effects.” *Kimbrough*, 552 U.S. at 94. Indeed, powder cocaine, a salt, is converted into crack cocaine, a base, simply by combining the powder cocaine with water and sodium bicarbonate, or baking soda. *DePierre*, 131 S.Ct. at 2228.

In light of the similarities between crack cocaine and powder cocaine, after the ADAA’s passage, the 100-to-1 ratio came under attack by “a chorus of critics, including practitioners, public officials (including

² Moreover, simple possession of 5 grams or more of cocaine base triggered a 5-year mandatory minimum sentence. 21 U.S.C. § 844 (2009). If an individual had 1 prior felony drug conviction, this 5-year mandatory minimum was triggered by only 3 grams of cocaine base; 2 prior felony drug convictions triggered the mandatory minimum if the individual possessed only 1 gram of cocaine base. Simple possession of other forms of cocaine, in contrast, never triggered a mandatory minimum sentence. *Id.*

judges), and scholars.” *United States v. Santana*, 761 F.Supp.2d 131, 135-36 (S.D.N.Y. 2011) (collecting sources). The United States Sentencing Commission, which initially adopted the 100-to-1 ratio in its Guidelines Manual, also repeatedly found that the ratio was “generally unwarranted.” *Kimbrough*, 552 U.S. at 97. In 1995, 1997, 2002, and 2007, the Sentencing Commission recommended that Congress eliminate or lower the 100-to-1 ratio in the ADAA.³ *Id.* at 99-100. It did so for three reasons. *Id.* at 97-98.

First, the basic assumptions underlying the disparate ratio proved to be false; research revealed that crack cocaine was neither more harmful, more prevalent among teenagers, nor associated with more violence than powder cocaine. *Id.* Second, the 100-to-1 ratio proved to be inconsistent with the ADAA’s goal of punishing major drug traffickers more severely because major traffickers generally dealt in powder cocaine, not crack cocaine. *Id.* at 98. And third, the 100-to-1 ratio worked to foster disrespect for and lack of confidence in the criminal justice system because it created an unwarranted racial disparity. *Id.* “Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio [were] imposed ‘primarily upon black offenders.’” *Id.*

³ The Sentencing Commission has limited the definition of “cocaine base” in the Guidelines to crack cocaine. U.S.S.G. § 2D1.1(c) (n.D). The statutory definition of “cocaine base” is broader. *DePierre*, 131 S.Ct. at 2231.

B. The Fair Sentencing Act of 2010

In response to the unfairness wrought by the ADAA, Congress passed, and the President signed into law on August 3, 2010, the Fair Sentencing Act. The Act passed the Senate by unanimous consent on March 17, 2010, and the House of Representatives by a voice vote on July 28, 2010.⁴

Of the Fair Sentencing Act's ten sections, three seek to ameliorate the disparity between crack cocaine and powder cocaine found in the federal sentencing laws, and two of those sections are at issue in this case.⁵

In Section 2, Congress lowered the 100-to-1 ratio to an effective 18-to-1 ratio by increasing the quantities of crack cocaine triggering the 5-year mandatory minimum penalty in 21 U.S.C. § 841(b)(1)(B)(iii) from 5 grams to 28 grams and the 10-year mandatory minimum penalty in 21 U.S.C. § 841(b)(1)(A)(iii) from 50 grams to 280 grams, § 2, 124 Stat. at 2372.⁶

⁴ 124 Stat. at 2375; S.1789: Fair Sentencing Act of 2010, at <http://www.govtrack.us/congress/bill.xpd?bill=s111-1789> (last visited Jan. 13, 2012).

⁵ Section 3 also eliminated the mandatory minimum penalties for cocaine base offenses in 21 U.S.C. § 844(b), but that section is not at issue here.

⁶ The Fair Sentencing Act also made identical amendments to 21 U.S.C. § 960. Although that section is not at issue in this case, its reach will be controlled by the decision in this case.

In Section 8, Congress directed the Sentencing Commission to

- (1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act . . . ; and
- (2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

§ 8, 124 Stat. at 2374.

In response, the Sentencing Commission promulgated an emergency, temporary amendment, effective November 1, 2010. See U.S.S.G. App. C, Amend. 748, Reason for Amend. The temporary amendment, *inter alia*, increased the quantities of crack cocaine set forth in the Drug Quantity Table, U.S.S.G. § 2D1.1(c), to reflect the increased quantities codified in 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii) pursuant to Section 2 of the Fair Sentencing Act. *Id.*

The Sentencing Commission later re-promulgated as permanent this portion of the temporary amendment, effective November 1, 2011. U.S.S.G. App. C., Amend. 750. The increased quantities now reflect the Fair Sentencing Act's 18-to-1 ratio. *Id.* On June 30, 2011, the Sentencing Commission voted unanimously

to designate this portion of the amendment as retroactively applicable to all eligible individuals previously sentenced under § 2D1.1 for a crack cocaine offense. U.S.S.G. § 1B1.10(c).⁷

The Fair Sentencing Act contains neither a saving clause nor an effective date clause. The latter omission simply means that the Fair Sentencing Act went into effect on the date of its enactment, August 3, 2010. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). The former omission means that Congress did not specifically save the former unfair penalties. This omission has centered the debate over the reach of the Fair Sentencing Act on the saving statute, 1 U.S.C. § 109. See generally *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

C. The Saving Statute, 1 U.S.C. § 109

In relevant part, the saving statute provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be

⁷ The temporary amendment also amended the guidelines to reflect the elimination of § 844's mandatory minimums for possession of crack cocaine. U.S.S.G. App. C, Amend. 748, Reason for Amend. The Sentencing Commission also re-promulgated this amendment as permanent, effective November 1, 2011, and made it retroactive. U.S.S.G. App. C., Amend. 750; U.S.S.G. § 1B1.10(c).

treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109.

The saving statute has its origins in the Reconstruction Era following the Civil War. See John P. MacKenzie, Comment, *Hamm v. City of Rock Hill and the Federal Saving Statute*, 54 Geo. L.J. 173 (1965). Enacted on February 25, 1871, as the last section of the Act "Prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof," ch. 71, 16 Stat. 432 (1871), the saving statute was nominally part of an 8-year task, begun in 1865, to codify all federal laws, MacKenzie, 54 Geo. L.J. at 175-76.

The 1871 Act originally contained four sections in addition to the saving provision. Cong. Globe, 41st Cong., 2d Sess. 2464-65 (1870). The first three sections sought to codify rules of construction to avoid surplusage and uncertainty in statutes. The first section sought to shorten the preamble to Acts of Congress. The second section set forth permissible interpretations of certain words (such as "masculine words might be applied to females"), and the third section defined the terms "State," and "oath." Similarly, the fourth section set forth a rule of statutory construction similar to the saving provision: "whenever an act shall be repealed which repeals a former act, such former act shall not thereby be revived,

unless the repealing act expressly so provides.”⁸ *Id.* As with the saving provision, these sections were meant primarily as technical changes to “revise, simplify, arrange, and consolidate” federal law. *See MacKenzie*, 54 Geo. L.J. at 176-77.

Below, the court of appeals held that the Fair Sentencing Act does not apply in this case due to the operation of the saving statute. Accordingly, the interplay between the two statutes is at the heart of this case.

II. Procedural History

A. Proceedings in the District Court

On January 7, 2009, a federal grand jury in the Central District of Illinois returned a one-count indictment against Mr. Dorsey, charging him with possession with intent to distribute 5 grams or more of crack cocaine on August 6, 2008, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(B)(iii) (“Count One”). J.A. 9-10. On April 20, 2009, the government filed an information, pursuant to 21 U.S.C. § 851, seeking enhanced penalties in light of Mr. Dorsey’s prior felony drug convictions. J.A. 11. On June 3, 2010, Mr. Dorsey pleaded guilty to Count One. J.A. 50-51. He admitted that he possessed with intent to distribute approximately 5.5 grams of crack cocaine. *Id.*

⁸ Congress did not pass the first section or the definition of “State” set forth in the third section. 16 Stat. 432.

On July 29, 2010, the probation officer prepared the Presentence Investigation Report (“PSR”). Using the November 1, 2009 Guidelines Manual, the probation officer first determined that Mr. Dorsey was responsible for 5.5 grams of crack cocaine, and, accordingly, set his base offense level at 24, pursuant to U.S.S.G. § 2D1.1(c)(8). PSR at 5. With a two-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a), Mr. Dorsey’s total offense level was 22. *Id.* With an offense level of 22 and a criminal history category of VI, Mr. Dorsey’s advisory guidelines range was 84 to 105 months’ imprisonment. *Id.* at 14. Because the probation officer determined that Count One involved more than 5 grams of crack cocaine, and because the government filed the § 851 information, the probation officer concluded that Mr. Dorsey faced a mandatory minimum 10-year sentence, which became the guidelines range, U.S.S.G. § 5G1.1(b).

On September 9, 2010, Mr. Dorsey filed a sentencing memorandum, asking the district court to sentence him under the Fair Sentencing Act because, under the Act, he would not incur a mandatory minimum penalty; the 5.5 grams of crack cocaine he possessed was substantially below the Fair Sentencing Act’s 28-gram threshold. J.A. 54-55.

At the sentencing hearing on September 10, 2010, the district court adopted the PSR and held the Fair Sentencing Act inapplicable because Mr. Dorsey committed the underlying criminal conduct prior to the Act’s enactment. J.A. 69-70. The district court sentenced Mr. Dorsey to the 10-year mandatory

minimum sentence based on the penalties in the prior version of § 841(b), to be followed by a mandatory minimum 8-year term of supervised release, and imposed a \$100 mandatory special assessment. J.A. 79-81, 84-95.

B. Proceedings in the Court of Appeals

On September 13, 2010, Mr. Dorsey filed a timely Notice of Appeal. J.A. 3. On November 12, 2010, he filed a motion to consolidate his appeal with that of Anthony Fisher, who had recently filed a brief arguing that the Fair Sentencing Act applied to all appeals pending on the date of the Act's enactment. *United States v. Fisher*, 635 F.3d 336, 338 (7th Cir. 2011). Although Fisher was sentenced before the Fair Sentencing Act's enactment, Mr. Dorsey sought consolidation to adopt the arguments raised by Fisher. The Seventh Circuit granted the motion and consolidated the cases on November 19, 2010. J.A. 4-5.

On December 6, 2010, Mr. Dorsey filed his Opening Brief. He adopted the arguments raised in Fisher's brief, namely, that the saving statute did not save the prior penalties in § 841(b) because, *inter alia*: (1) he did not seek abatement; (2) Congress did not intend to save the former penalties; and (3) the Fair Sentencing Act's purpose – to remedy an unwarranted racial disparity – precluded the saving statute's application. He further asserted that the text of the Fair Sentencing Act necessarily implied that Congress intended the Act to apply immediately to all

individuals not yet sentenced on the date of enactment. Finally, Mr. Dorsey asserted that, because he was sentenced after the Fair Sentencing Act's enactment, he never "incurred" a mandatory minimum penalty under the prior version of § 841(b). Mr. Dorsey further noted that, if the temporary, emergency amendment to the drug guideline applied in his case, his base offense level would fall to 16, U.S.S.G. § 2D1.1(c)(12), and his advisory guideline range would plummet from 84 to 105 months' imprisonment to 37 to 46 months' imprisonment.

The government disagreed, citing the saving statute, 1 U.S.C. § 109.⁹ The case was argued orally on February 15, 2011. J.A. 7.

Less than one month later, on March 11, 2011, a panel of the Seventh Circuit affirmed. J.A. 96-102; *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011). The Seventh Circuit held: "the FSA does not apply retroactively, and [we] further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." J.A. 101-02; *Fisher*, 635 F.3d at 340. The apparent basis for this ruling was the saving statute and the court's earlier decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), which held that the Fair Sentencing Act did not apply to cases pending on

⁹ The government has since changed its position and now asserts that the district court should have sentenced Mr. Dorsey under the Fair Sentencing Act.

appeal on the date of its enactment. J.A. 98; *Fisher*, 635 F.3d at 338.

On March 23, 2011, Mr. Dorsey filed a timely Petition for Rehearing en banc. J.A. 7. On May 25, 2011, the Seventh Circuit denied rehearing en banc, with two judges dissenting. J.A. 103-15; *United States v. Fisher*, 646 F.3d 429 (7th Cir. 2011). In dissent, Judge Williams, joined by Judge Hamilton, concluded that the Fair Sentencing Act should apply to all defendants sentenced after its enactment. J.A. 105; *Fisher*, 646 F.3d at 430.¹⁰

On November 28, 2011, this Court granted the petitions in this case and in *Hill v. United States*, No. 11-5721, and consolidated the cases for oral argument.

¹⁰ On August 24, 2011, the Seventh Circuit issued another opinion refusing to rehear the issue presented in this case en banc. *United States v. Holcomb*, 657 F.3d 445, 445 (7th Cir. 2011). The decision was a 5-5 split, with five judges affirming *Fisher*, and the other five repudiating it for those reasons expressed by the dissent from the denial of rehearing en banc. Joining Judges Williams and Hamilton were Judges Posner, Wood, and Rovner. *Id.* at 452-63. Judges Wood and Rovner were on the original panel that decided *Fisher*, and so two of the three judges who decided *Fisher* now believe the decision is incorrect. Judge Evans, who authored *Fisher*, passed away on August 10, 2011.

SUMMARY OF THE ARGUMENT

The issue in this case is one of statutory interpretation, and it involves the intersection of two statutes: one enacted in August 2010 (the Fair Sentencing Act); the other enacted in 1871 (the saving statute). The lower courts have focused primarily on the text of the Fair Sentencing Act, assuming that the saving statute normally precludes the application of an ameliorative amendment to a statutory mandatory minimum penalty provision, even if that amendment was in effect on the date of sentencing. *See, e.g., Holcomb*, 657 F.3d 445.

Even assuming this assumption is accurate, it is not dispositive. Rather, the saving statute “cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.” *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (emphasis added). The text of the Fair Sentencing Act provides the “necessary implication” that Congress intended the Act to apply to all individuals sentenced after its enactment. *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011). The Seventh Circuit’s decision to the contrary should be reversed.

Moreover, the lower courts’ assumption is inaccurate. By its own terms, the saving statute saves only penalties “incurred” under a prior statute. This Court’s decision in *Hertz v. Woodman*, 218 U.S. 205, 220 (1910), makes clear that a penalty is incurred only upon the occurrence of all facts and events essential

to its imposition. This definition reflects the plain meaning of the term “incurred” around the time of the saving statute’s enactment. Black’s Law Dictionary 613 (1891). Under this definition, a penalty is “incurred” only by a subsequent act or operation of law. *Id.* Accordingly, a penalty is not incurred when an offense is committed.

Instead, with respect to a mandatory minimum penalty under 21 U.S.C. § 841(b), the penalty is not incurred until sentencing because under prevailing law drug quantity under § 841(b), for mandatory minimum purposes, is a sentencing factor, and not an element of the offense. *See, e.g., United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002). Although it did so in Mr. Dorsey’s case, the government did not need to allege drug quantity in the indictment, or prove it to a jury beyond a reasonable doubt. *Id.* at 864-66. Rather, the district court determines drug quantity, as it does all sentencing factors, under a preponderance of the evidence standard based on evidence submitted at the sentencing hearing. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986).

Because Mr. Dorsey was sentenced after the Fair Sentencing Act’s enactment, he never “incurred” a mandatory minimum penalty under the prior version of § 841(b) for purposes of the saving statute. Thus, the district court should have sentenced him under the amended provisions of § 841(b). Principles of statutory retroactivity support this conclusion. The saving statute, by its own terms, does not preclude this common-sense result. Accordingly, this Court should

reverse the Seventh Circuit's decision to the contrary and remand this case for resentencing.

The saving statute is also inapplicable in this case because, by its own terms, it applies only to the "repeal" of a statute. 1 U.S.C. § 109. The Fair Sentencing Act did not "repeal" 21 U.S.C. § 841(b); it "amended" it. § 2, 124 Stat. at 2372. Thus, only if the term "repeal" in the saving statute is considered ambiguous could the saving statute be interpreted to extend to amendments. Yet, even if the statute is considered ambiguous, in light of its history and purpose, as well as the statutory presumption favoring strict construction of statutes in derogation of the common law and the rule of lenity, it should be construed strictly not to reach ameliorative amendments to criminal penalty provisions in effect on the date of sentencing.

The saving statute was enacted as a general rule of statutory construction to assist in the codification of all federal laws. Cong. Globe, 41st Cong., 2d Sess. 2466 (1870); Cong. Globe, 41st Cong., 3d Sess. 775, 1474 (1871). Its purpose was to obviate the common law presumption of abatement following the repeal, or abrogation, of a statute. *Warden v. Marrero*, 417 U.S. 653, 660 (1974). It was also meant to obviate mere technical abatement, which occurred when a repealing statute increased a penalty provision, rather than abrogated it. *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964).

In contrast, the saving statute was not meant to obviate the common law rule of amelioration, or the rule "quite generally followed by the federal and state courts alike that where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto," *Moorehead v. Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). To the extent this Court has suggested otherwise, this suggestion should be revisited. The saving statute has no application in this case because the Fair Sentencing Act involves an ameliorative amendment to a penalty provision, and this amendment was in effect on the date Mr. Dorsey was sentenced. A strict construction of the saving statute, necessary because it is derogation of the common law, as well as the rule of lenity, supports this conclusion. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

Accordingly, the Seventh Circuit erred when it held that the Fair Sentencing Act did not apply at Mr. Dorsey's initial sentencing hearing, despite the fact that the Act was in effect on that date. Its decision should be reversed, and this case should be remanded for resentencing under the Fair Sentencing Act.

ARGUMENT

I. The Fair Sentencing Act Necessarily Implies That Congress Intended It To Apply To All Those Sentenced After Its Enactment.

This Court has made clear that an express statement in new legislation is unnecessary to override the saving statute. The saving statute “cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.” *Great Northern Ry. Co.*, 208 U.S. at 465 (emphasis added). More recently, this Court reaffirmed that the saving statute may be superseded by “fair implication” of a later act. *Warden v. Marrero*, 417 U.S. at 659 n.10; see also *Holcomb*, 657 F.3d at 461 (Posner, J., dissenting).

As the Third Circuit has held, the text of the Fair Sentencing Act fairly implies that Congress intended the Act to apply immediately to all individuals not yet sentenced after its enactment. *Dixon*, 648 F.3d at 203. The primary evidence of this is Section 8, where Congress granted emergency authority to the Sentencing Commission to make conforming amendments to the guidelines in order to achieve consistency with the Fair Sentencing Act. *Id.* at 201-02.

The importance of this emergency directive lies in Congress’ earlier directive, in the Sentencing Reform Act of 1984, that district courts must apply the Guidelines “in effect on the date the defendant is sentenced.” 18 U.S.C. § 3553(a)(4)(A)(ii); *Dixon*, 648

F.3d at 201. This directive confirms that, when Congress directed the Sentencing Commission to amend the guidelines in emergency fashion, it knew that these amendments would apply “at the date of sentencing, regardless of when the offense occurred.” *Dixon*, 648 F.3d at 201. The “fair implication” from this is that Congress intended that the ameliorative provisions of the Fair Sentencing Act apply immediately to all those sentenced after the Act’s enactment. *Id.* at 200-02; *Holcomb*, 657 F.3d at 456-57 (Williams, J., dissenting).

Both Petitioner Hill and the government will make this argument as well, and so this brief avoids unnecessary repetition. See Pet. for Writ of Cert. in *Hill v. United States*, No. 11-5721 (July 1, 2011); Br. for U.S. in *Hill v. United States*, No. 11-5721 (Oct. 7, 2011). If Mr. Hill asserts that only those who are sentenced on or after November 1, 2010 should receive the benefit of the Fair Sentencing Act, Mr. Dorsey disagrees.

Although the First Circuit has adopted this date as the relevant sentencing date for the Fair Sentencing Act’s application, it did so only because the facts of that case involved a defendant sentenced after November 1, 2010. *United States v. Douglas*, 644 F.3d 39, 46 (1st Cir. 2011). The First Circuit implied that the same result would apply to an individual sentenced between August 3, 2010 and November 1, 2010, especially if the amended guidelines were made retroactive, which they were. *Id.*

Moreover, in Section 8, Congress directed the Sentencing Commission to amend the guidelines “as soon as practicable and in any event not later than 90 days after the date of enactment of this Act.” § 8, 124 Stat. at 2374. Given the extensive policy-making discretion accorded the Commission in promulgating amendments that would be “consistent with” the Fair Sentencing Act, the 90-day language is no more than an administrative necessity, not a directive by Congress to distinguish between those sentenced on or after August 3, 2010, and those sentenced on or after November 1, 2010.

Because Mr. Dorsey was sentenced after the Fair Sentencing Act’s enactment, he should have been sentenced under its amended provisions, and the Seventh Circuit’s decision to the contrary should be reversed.

II. The Saving Statute Is Inapplicable Because Mr. Dorsey Never Incurred A Penalty Under The Prior Version Of § 841(b).

Turning to the text of the saving statute, statutory interpretation begins with the statute’s text. *Dean v. United States*, 129 S.Ct. 1849, 1853 (2009). The saving statute provides, in relevant part, “[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability *incurred* under such statute.” 1 U.S.C. § 109 (emphasis added). “Incurred” is not defined. This Court, however, has interpreted the term in *Hertz*

v. Woodman, 218 U.S. 205 (1910). Moreover, the ordinary meaning of the term “incurred,” as it was understood around the time when the saving statute was enacted, is also relevant. *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009).

A. A penalty is not incurred at the time an offense is committed.

Without citing any authority, the Seventh Circuit below held that a criminal penalty is “incurred” when the offense is committed. J.A. 101-02; *Fisher*, 635 F.3d at 340; *see also United States v. Tickles*, 661 F.3d 212, 215 (5th Cir. 2011); *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011). This conclusion contradicts this Court’s interpretation of the term “incurred,” and well as the term’s plain meaning.

i. Under this Court’s precedent, a penalty is “incurred” for purposes of the saving statute when no other fact or event is essential to its imposition.

In *Hertz v. Woodman*, this Court held that a tax liability was “incurred” for purposes of the saving statute when “the occurrence of no other fact or event was essential to the imposition” of the tax. 218 U.S. at 220. The case involved an inheritance tax and its repeal after the death of Woodman. *Id.* at 210-11. The issue was whether the tax on Woodman’s inheritance survived the repeal because Woodman died prior to the repeal. *Id.*

This Court answered in the affirmative. *Id.* at 220, 224. It held that the saving statute saved the prior tax because the defendants, Woodman's beneficiaries under his will, inherited their legacies, or shares, immediately upon Woodman's death. *Id.* at 219-20. "No further event could make their title more certain nor their possession and enjoyment more secure." *Id.* at 220. Thus, because the defendants inherited their shares upon Woodman's death, and because the inheritance tax had not yet been repealed when Woodman died, the defendants were obligated to pay the tax. *Id.* And, because they were obligated to pay the tax, they incurred liability. 218 U.S. at 220. The liability was incurred "when no other fact or event was essential to [its] imposition." *Id.*

This interpretation of the term incurred is in direct conflict with the Seventh Circuit's decision below that a criminal penalty is incurred at the time the offense is committed. J.A. 101-02; *Fisher*, 635 F.3d at 340. A penalty is not incurred when an offense is committed because *at least* two other essential facts or events must occur – the return of an indictment and a subsequent conviction.¹¹ Cf. *Hertz*, 218

¹¹ As discussed below in subsection B, in the federal system, and especially with respect to a mandatory minimum penalty, under § 841(b) or any other statute, a third event must occur – the determination of sentencing factors, in this case, drug quantity (and the determination of a prior conviction), and this does not occur until sentencing. Therefore, at a minimum, in order for a mandatory minimum penalty to be "incurred," the defendant would have to be indicted, convicted, and sentenced.

U.S. at 220. The occurrence of each of these facts are essential to the imposition of a penalty. *Id.* Until they occur, a penalty is not incurred.

ii. This Court's precedent is consistent with the plain meaning and usage of the term "incurred."

This Court's interpretation of the word "incurred" is consistent with how the term was defined around the time of the saving statute's enactment. The legal dictionaries defined "incur" by contrasting it with an affirmative act: "Men contract debts; they incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by act or operation of law." Black's Law Dictionary 613 (1891); Dictionary of Terms and Phrases Used in American or English Jurisprudence, Vol. 1, at 595-96 (1879).

Consistent with this Court's decision in *Hertz*, this definition confirms that there must be some legal action "cast upon" the defendant after an offense is committed before a penalty can be incurred. If no legal action is taken, nothing is incurred. Because "incurred," by definition, is contingent on a subsequent act or operation of law, an individual does not incur anything prior to the act or operation of law. In this case, therefore, a penalty is not incurred at the time the defendant traffics in crack cocaine. Rather,

subsequent events, like the filing of an indictment,¹² conviction, and sentence on the indictment must happen before any penalty is incurred.

Congress' use of the past tense of the verb in the saving statute supports this construction because the use of the past tense "denot[es] an act that has been completed." *Barrett v. United States*, 423 U.S. 212, 216 (1976). The penalty has to have been incurred; it is not enough that the penalty might possibly incur at some future point. *Id.*; *Hertz*, 218 U.S. at 218-20; compare 1 U.S.C. § 109, *with Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205 (1994) (reference to "incurring possible escalating daily penalties"); *Nash v. United States*, 229 U.S. 373, 377 (1913) (Holmes, J.) ("If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."); *United States v. Padelford*, 9 Wall. (76 U.S.) 531, 543 (1869) (pardon purged a participant of whatever offense he committed and relieved him "from any penalty which he might have incurred").

Moreover, in common usage, one would not say that he incurred a penalty when he committed a

¹² While an indictment would be *necessary* to incur a penalty, it would not be *sufficient* on its own. The indictment may be dismissed, or more importantly, a jury may return a not guilty verdict at trial. Moreover, to say that a penalty is incurred by the filing of an indictment ignores the presumption of innocence the law affords every criminal defendant. *In re Winship*, 397 U.S. 358, 363 (1970). It cannot be correct that a person that is presumed *innocent* nonetheless has already incurred a *penalty* merely by the filing of an indictment.

crime. After all, not all crimes are detected. It makes little sense to say that one has incurred a *penalty* by a criminal act that will forever go *unpunished*. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (in matters of statutory construction, the Court “must be guided to a degree by common sense”). For instance, one would not say that the habitual speeder incurs penalties to and from work if he is never stopped for speeding.

Unlike some state saving statutes, Congress did not refer to “offense committed” or “act done” within the text of the saving statute.¹³ Yet, Congress knew how to include this language in a saving statute. In an Act passed less than one year prior to the passage of the saving statute (July 1870 v. February 1871), Congress repealed a tax on legacies and successions, but included this language in the repealing statute: “this act shall not be construed to affect any *act done*,

¹³ See, e.g., Ky. Rev. Stat. Ann. § 446.110 (“No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred . . . under the former law[.]”); N.H. Rev. Stat. Ann. § 624:5 (“No offense committed and no penalty or forfeiture incurred . . . shall be affected by the repeal . . .”); N.Y. Gen. Constr. Law § 93 (McKinney) (“The repeal of a statute or part thereof shall not impair any act done, offense committed or . . . penalty, forfeiture or punishment incurred . . .”); Tex. Gov’t Code Ann. § 311.031 (West) (“[T]he . . . repeal of a statute does not affect . . . any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute. . . .”); W. Va. Code Ann. § 2-2-8 (West) (“The repeal of a law . . . shall not affect any offense committed, or penalty or punishment incurred. . . .”).

right accrued, or *penalty incurred* under former acts, but every such act is hereby saved." An Act to reduce Internal Taxes, and for other Purposes, ch. 255, § 17, 16 Stat. 256, 261 (1870).¹⁴

If "penalty incurred" were synonymous with "offense committed," as the Seventh Circuit held, this federal statute, and the various state statutes, are implausibly superfluous. See n.12 & 13, *supra*; *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'"). If a penalty is actually incurred when an act is done, there would have been no need for Congress to enumerate both "act done" and "penalty incurred" in the 1870 statute. *Duncan*, 533 U.S. at 174 (noting this Court's general "reluctan[ce] to treat statutory terms as surplusage."). The phrase "penalty incurred" is not synonymous with "offense committed." Thus, the Seventh Circuit erred below when it held that a penalty is incurred when the offense is committed. J.A. 101-02; *Fisher*, 635 F.3d at 340.

¹⁴ The following Acts contained similar language: An Act to amend existing Laws relating to Internal Revenue, and for other Purposes, ch. 169, § 34, 14 Stat. 471, 485 (1867); An Act to reduce Duties on Imports, and to reduce Internal Taxes, and for other Purposes, ch. 315, § 46, 17 Stat. 230, 258 (1872); An Act revising and amending the Laws relative to the Mints, Assay Offices, and Coinage of the United States, ch. 131, § 67, 17 Stat. 424, 435 (1873).

B. A mandatory minimum penalty under § 841(b) is not incurred until the imposition of sentence because, under current prevailing law, drug quantity is a sentencing factor that is determined by the court at sentencing.

Under *Hertz*, and the term's plain meaning, the meaning of "incurred" centers on what facts and events are essential for the imposition of a penalty. *Id.* at 220. In *Hertz*, it was not considered essential that the tax had not been paid at the time of repeal; what was essential was that the obligation to pay the tax had accrued. *Id.* at 210, 219-20. In the federal system, and especially with respect to a mandatory minimum penalty under § 841(b), in addition to indictment and conviction, there is another essential event that must occur – the determination of sentencing factors, such as drug quantity and the existence of a prior conviction – and such determinations are not made until sentencing.

The Fair Sentencing Act did not amend the *substantive* provisions in § 841(a), but rather amended the *penalty* provisions in § 841(b) by increasing the quantity of crack cocaine necessary to trigger certain mandatory minimum penalties.¹⁵

¹⁵ The Fair Sentencing Act also had the effect of lowering the statutory maximum penalties in § 841(b), but those penalties are not at issue in this appeal. Rather, while the statutory maximum would fall from life to 30 years' imprisonment, Mr. Dorsey received a 10-year mandatory minimum sentence. His
(Continued on following page)

In most Circuits, including the Seventh Circuit, where this case originates, the drug quantity necessary to trigger § 841(b)'s mandatory minimum penalties is a sentencing factor, not an element of the offense.¹⁶ It has been held that "a statute that sets a mandatory minimum neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range available to it." *United States v. Krieger*, 628 F.3d 857, 863 (7th Cir. 2010), cert. denied, 132 S.Ct. 139 (2011).

Because under current prevailing law drug quantity for mandatory minimum purposes is a sentencing factor, it is found by a judge at sentencing by a preponderance of the evidence submitted at the

advisory guidelines range was below this minimum (84 to 105 months' imprisonment), and the range would be even lower upon resentencing under the Fair Sentencing Act (37 to 46 months' imprisonment). Thus, this case concerns a statutory mandatory minimum sentence. The statutory maximum, whether life or 30 years' imprisonment, is irrelevant.

¹⁶ *Martinez*, 301 F.3d at 865; see also *United States v. Goodine*, 326 F.3d 26, 31-33 (1st Cir. 2003); *United States v. Solis*, 299 F.3d 420, 454 (5th Cir. 2002); *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003); *United States v. Webb*, 545 F.3d 673, 677 (8th Cir. 2008); *United States v. Wilson*, 244 F.3d 1208, 1215 n.4 (10th Cir. 2001); *United States v. Taylor*, 317 Fed. Appx. 944, 947-48 (11th Cir. 2009) (unpublished); contra *United States v. Graham*, 317 F.3d 262, 274-75 (D.C. Cir. 2003); *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005); *United States v. Martinez*, 277 F.3d 517, 527-30 (4th Cir. 2002).

sentencing hearing. *See McMillan*, 477 U.S. at 91; *Fisher*, 646 F.3d at 434 (Williams, J., dissenting). It need not be alleged in the indictment, nor proven at trial beyond a reasonable doubt.

For instance, if Mr. Dorsey had pleaded guilty to the possession of 4 grams of crack cocaine, rather than 5.5 grams of crack cocaine, but the government introduced evidence to establish the latter quantity at sentencing, the district court would have been required to impose the mandatory minimum, even though Mr. Dorsey never admitted the greater drug quantity. *See, e.g., United States v. Clark*, 538 F.3d 803, 805-06 (7th Cir. 2008) (defendant did not admit to any drug quantity when he pleaded guilty, but the district court was still required to impose the mandatory minimum based on the drug quantity findings made at the sentencing hearing).

Thus, under *Hertz*, as well as the plain meaning of “incurred,” the mandatory minimum penalty under § 841(b) is incurred only at sentencing because it is only then that all facts and events essential to the imposition of penalty are satisfied. *Cf. 218 U.S. at 220*. Even after a conviction, the mandatory minimum penalty has not been established. *Clark*, 538 F.3d at 805-06. That happens at sentencing, and, therefore, the penalty is not incurred until sentencing. *Cf. Hertz*, 218 U.S. at 220; *see also McMillan*, 477 U.S. at 91; *Martinez*, 301 F.3d at 865.

This Court implied as much in *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). There, the issue

was whether a district court could constitutionally apply an obstruction of justice enhancement under U.S.S.G. § 3C1.1, at a time when the provision was *mandatory*. 507 U.S. at 88-89. In answering in the affirmative, this Court noted, “not every accused who testifies at trial and is convicted *will incur* an enhanced sentence under § 3C1.1 for committing perjury.” *Id.* at 95 (emphasis added). This was so because the district court determines whether the defendant actually committed perjury *at the time of sentencing*, not at trial, because obstruction, for purposes of § 3C1.1, is a *sentencing factor*, not an element of the underlying offense. *See id.*

The same logic applies in this case. Because the district court determines drug quantity – which, under prevailing law is a *sentencing factor* for mandatory minimum purposes – based on evidence introduced *at sentencing*, the mandatory minimum penalty is incurred only at sentencing. As in *Dunnigan*, and consistent with *Hertz*, not every defendant who is convicted of a § 841(a) offense *will incur* a mandatory minimum penalty, but, if a defendant does, the penalty is incurred at sentencing, and not before. Only at sentencing have all facts and events essential to the penalty’s imposition occurred. *Hertz*, 218 U.S. at 220.

This is not to say that “incur” is synonymous with “impose.” Rather, the terms share a semantic relationship, similar to the terms “receive” and “give.” Linguistically, this could be called an “agent-patient” relationship. *See, e.g.*, D.J. Allerton, *Verbs and their Satellites*, in *The Handbook of English Linguistics*

152 (Blackwell ed. 2006). For instance, when a court imposes a penalty, the defendant incurs it, which is similar to saying that one receives an object when it is given. In other words, the terms “incur” and “impose” are not synonymous, but rather work in tandem, like the words “give” and “receive.” One would not say that “give” means “receive”; nor should one say that “incur” means “impose.” Instead, a penalty is incurred when it is imposed, just as a gift is received when it is given. *See, e.g., Carmell v. Texas*, 529 U.S. 513, 523 n.11 (2000) (citing a 1792 text for the proposition that a defendant could not *incur* banishment as a punishment because the law precluded its *imposition*); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 n.27 (1974) (citing 1845 text for proposition that “jurors always determined the amount of deodand *to be imposed* with great moderation, and with a due regard to the rights of property and the moral innocence of the party *incurring the penalty*”) (emphasis added).

This interpretation corresponds to Congress’ use of the sentencing date to determine the applicable sentencing guidelines range, 18 U.S.C. § 3553(a)(4)(A)(ii), as well as the applicable statutory penalty range under certain statutes (including mandatory minimum penalties), *see James v. United States*, 550 U.S. 192, 213-14 (2007) (recidivism increase and mandatory minimum in 18 U.S.C. § 924(e)); *Almendarez-Torres v. United States*, 523 U.S. 224, 245-46 (1998) (recidivism increase in 8 U.S.C. § 1326). In each case, an individual’s penalty is determined at sentencing, based

on evidence introduced at the sentencing hearing, irrespective of the facts developed at trial or admitted during a change-of-plea colloquy. *See also* 18 U.S.C. § 3553(e) (authorizing discretion to impose a sentence below the mandatory minimum upon the government's motion for substantial assistance).

For instance, if an individual is found to have brandished or discharged a firearm possessed in furtherance of a crime of violence or drug trafficking crime, he incurs an enhanced mandatory minimum sentence (of 7 or 10 years, respectively) only after such a finding is made at sentencing. *See Harris v. United States*, 536 U.S. 545, 568 (2002). The same is true with respect to a statutory recidivist increase. If the government introduces evidence at a sentencing hearing of a prior conviction in a felon-in-possession-of-a-firearm case, and the sentencing court determines that the prior conviction qualifies as a "violent felony," the defendant has incurred a higher penalty range, as well as a 15-year mandatory minimum sentence, at sentencing. *See, e.g., James*, 550 U.S. at 195-96. "[N]o penalty is incurred until the defendant is convicted, judgment entered and sentence imposed. . ." *State v. Tapp*, 26 Utah 2d 392, 395, 490 P.2d 334, 336 (1971) (interpreting analogous state saving statute); *but see State v. Reis*, 115 Haw. 79, 91-92, 165 P.3d 980, 992-93 (Haw. 2007) (collecting cases).

Finally, this interpretation is consistent with the courts of appeals' unanimous refusal to apply the Fair Sentencing Act to cases pending on appeal on the date of its enactment. *See United States v. Powell*,

652 F.3d 702 (7th Cir. 2011) (collecting cases). For individuals sentenced prior to the Fair Sentencing Act's enactment, the penalty incurred under the prior version of § 841(b) because that provision was in effect when the sentence was imposed.

For an individual sentenced after the Fair Sentencing Act's enactment, however, like Mr. Dorsey, a mandatory minimum penalty was never "incurred" under the prior version of § 841(b) because that version no longer existed at the time of sentencing. Accordingly, because Mr. Dorsey did not incur a penalty under the prior version of § 841(b), the saving statute, by its own terms, has no application in this case. Instead, Mr. Dorsey should have been sentenced under the Fair Sentencing Act's amended provisions. Because he was not, the Seventh Circuit's decision in this case must be reversed.

C. Principles of retroactivity support the conclusion that a mandatory minimum penalty is incurred at sentencing.

Rather than address the meaning of "incurred," the Seventh Circuit instead identified the date of the offense conduct as the "relevant retroactivity event" for purposes of the Fair Sentencing Act's application. J.A. 101-02; *Fisher*, 635 F.3d at 340. Other courts have written on this subject in terms of "retroactivity" rather than in terms of when a penalty is incurred under the saving statute.

Even assuming that a statutory retroactivity analysis is relevant, the application of a mandatory minimum penalty provision, in effect on the date of sentencing, is not a retroactive exercise. “[T]he relevant retroactivity event is the sentencing date, not the date the offense was committed, because the application of a mandatory minimum is a sentencing factor, not an element of the offense. Accordingly, the application of the FSA is the *prospective* application of current law, not a *retroactive* exercise.” *United States v. Holloman*, 765 F.Supp.2d 1087, 1090-91 (C.D. Ill. 2011) (Mills, J.); see also *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 269 (1994) (“[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law.”).

This Court’s traditional approach to statutory retroactivity is rooted in *ex post facto* principles. *Landgraf*, 511 U.S. at 269-70; *Id.* at 290 (Scalia, J., concurring). Under this approach, a statute operates retroactively only if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Landgraf*, 511 U.S. at 269-70. A statute that “merely remove[s] a burden on private rights by repealing a penal provision” is not a retroactive statute. *Id.* at 270. Because the Fair Sentencing Act lowered § 841(b)’s penalty provisions, it does not fall within the definition of a retroactive statute. *Id.* at 270, 280.

This conclusion also follows from the application of the more modern “temporal application” approach to statutory retroactivity. *See, e.g., id.* at 291-92 (Scalia, J., concurring); *Rep. of Austria v. Altmann*, 541 U.S. 677, 681, 697 n.17, 697-98 (2004). The critical issue under this approach is:

what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event.

Landgraf, 511 U.S. at 291-92 (Scalia, J., concurring).

This approach recognizes that statutory retroactivity is not as simple as identifying the date of the commission of the relevant act and asking whether it preceded the date of the new provision’s enactment. *Landgraf*, 511 U.S. at 269-70. For instance, in *Rep. of Austria v. Altmann*, this Court held that the Foreign Services Intelligence Act, 28 U.S.C. § 1602 (1976), applied to claims that were based on conduct that preceded the enactment of the Act because the claims, rather than the underlying conduct initiating the claims, were “the relevant conduct regulated by the Act.” 541 U.S. 677, 681, 697 n.17, 697-98 (2004); *see also Landgraf*, 511 U.S. at 293 (Scalia, J., concurring) (because an injunction operates in the future, “the

relevant time for judging its retroactivity is the very moment at which it is ordered.”).

Under this approach, the relevant retroactivity event in this case is the imposition of sentence, as the Fair *Sentencing Act* obviously regulates *sentrncing*. *Holloman*, 765 F.Supp.2d at 1090-91; *see also Altmann*, 541 U.S. at 681, 697-98; *Landgraf*, 511 U.S. at 291-92 (Scalia, J., concurring). The drug quantities in § 841(b) amended by the Fair Sentencing Act are *sentrncing factors*, and are based on evidence introduced at the sentencing hearing. *Martinez*, 301 F.3d at 865; *see also McMillan*, 477 U.S. at 91.

Because the Fair Sentencing Act was in full force and effect at the time Mr. Dorsey was sentenced, the Act applied prospectively in his case, not retroactively, and he should have been sentenced under its provisions. *Holloman*, 765 F.Supp.2d at 1090-91. Because the Seventh Circuit held differently in this case, its decision should be reversed.¹⁷

III. The Saving Statute Should Not Preclude The Prospective Application Of An Ameliorative Amendment To A Penalty Provision.

The saving statute is inapplicable by its terms for a second, independent reason: it is triggered only by

¹⁷ If this Court determines that the term “incurred” is ambiguous, it should construe the term in Mr. Dorsey’s favor in light of the arguments made in Section III(B)-(D).

the “repeal” of a statute, and the Fair Sentencing Act expressly “amended” rather than “repealed” § 841(b). The legislative history and the statute’s purposes, as explained by this Court, confirm that it was not meant to preclude the application of ameliorative amendments to penalty provisions. Particularly telling is the rejection of a revision to the saving statute that would have expressly reached penalty ameliorations. To the extent this Court has suggested otherwise in *Marrero*, this Court should reconsider its suggestion. Under a strict construction of the saving statute, and in light of the rule of lenity, the saving statute should not be interpreted to preclude the application of an ameliorative penalty amendment, like the one at issue in this case, to an individual, like Mr. Dorsey, who was sentenced after the effective date of the amendment.

A. Under its plain terms, the saving statute applies only to “repeals.”

The saving statute provides: “[t]he *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the *repealing* Act shall so expressly provide....” 1 U.S.C. § 109 (emphasis added). The Fair Sentencing Act did not “repeal” 21 U.S.C. § 841(b); it “amended” it (specifically, the drug quantities in 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii)). § 2, 124 Stat. at 2372.

"Repeal" and "amend" were defined differently at the time the saving statute was enacted.¹⁸ Moreover, Congress used the terms concomitantly in legislation passed in or around 1871 (the date the saving statute was enacted).¹⁹ If the words had the same meaning,

¹⁸ Compare Black's Law Dictionary 67 (2d ed. 1891) ("Amendment. In legislation. A modification or alteration proposed to be made in a bill on its passage, or an enacted law; also such modification or change when made."), with *id.* at 1023 (2d ed. 1891) ("Repeal. The abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated, (which is called 'express' repeal,) or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force, (called 'implied' repeal.)").

¹⁹ See, e.g., An Act to provide a Government for the District of Columbia, ch. 62, §§ 18, 28, 17 Stat. 419, 423, 425 (1871) ("[A]ll acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress. . . ."; "[T]he said legislative assembly shall have the power to create by general law, modify, repeal, or amend, . . . corporations . . . and to define their powers and liabilities. . . .") (enacted February 21, 1871, four days before the enactment of the saving statute); An Act granting the Right of Way through the public Lands to the Jacksonville and Saint Augustine Railroad Company, ch. 323, 17 Stat. 280, 280 (1872) ("Congress shall have the right to alter, amend, or repeal this act[.]"); An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, § 7, 17 Stat. 13, 15 (1871) ("[N]othing herein contained shall be construed to supersede or repeal any former act or law. . . ."); An Act to prevent the Extermination of Fur-bearing Animals in Alaska, ch. 189, § 8, 16 Stat. 180, 182 (1870) ("Congress may at any time hereafter alter, amend, or repeal this act"); An Act to amend an Act entitled "An Act to incorporate the Freedman's Saving and Trust Company," approved March third, eighteen hundred and sixty-five, ch. 90, 16 Stat. 119, 119 (1870) ("Congress shall have the right to alter

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then Congress enacted a bevy of superfluously worded statutes, a result this Court would hardly reach. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“We are ‘reluctant to treat statutory terms as surplusage in any setting.’”).

Moreover, the words are still defined differently today.²⁰ And so, when Congress said it “amended” 21 U.S.C. § 841(b) in the Fair Sentencing Act, § 2, 124 Stat. at 2372, that is what it did. It did not “repeal” § 841(b) or any of its provisions. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981) (“We prefer to read the statute as written.”); *Shlahtichman v. 1-800-Contacts, Inc.*, 615 F.3d 794, 801 (7th Cir. 2010) (“The statutory language strikes us as significant not only for the terms that it uses but for those it does not.”), *cert. denied*, 131 S.Ct. 1007 (2011).

or repeal this amendment at any time.”). An Act to provide for the Creation of Corporations in the District of Columbia by General Law, ch. 80, 16 Stat. 98, 116 (1870) (“[T]he Congress of the United States may at any time alter, amend, or repeal this act . . . and may amend or repeal any incorporation formed or created under this act[.]”); An Act to incorporate the Washington Mail Steamboat Company, ch. 33, § 8, 16 Stat. 78, 79 (1870) (“Congress may at any time hereafter alter, amend, or repeal this act.”).

²⁰ Compare Black’s Law Dictionary 94 (9th ed. 2009) (defining amendment as “A formal revision or addition . . . made to a statute . . . ; specif., a change made by addition, deletion, or correction; esp., an alteration in wording.”), with *id.* at 1413 (defining repeal as “abrogation of an existing law by legislative act,” and noting that a repeal may be “express” or “implied”).

Nor does the term "repeal," if contained in a saving statute, necessarily encompass "amend." For instance, most states have saving statutes, and those statutes, when meant to reach farther than "repeal," include language to that effect.²¹ If "repeal" included "amend," or meant something other than the abrogation of a statute, these statutes would be as superfluous as the federal statutes cited above.

The inclusion of "repeal by implication" in the definition of "repeal" does not undermine this point. See n.18 & 20, *supra*. By its terms, the Fair Sentencing

²¹ See, e.g., Me. Rev. Stat. tit. 1, § 302 ("repeal or amendment"); Vt. Stat. Ann. tit. 1, § 214 (West) (same); Mo. Ann. Stat. § 1.160 (West) (same) ("repealed or amended"); Wyo. Stat. Ann. § 8-1-107 (West) (same); Ga. Code Ann. § 16-1-11 (West) ("repeal, repeal and reenactment, or amendment"); Ohio Rev. Code Ann. § 1.58 (West) ("reenactment, amendment, or repeal"); Tex. Gov't Code Ann. § 311.031 (West) ("reenactment, revision, amendment, or repeal"); Colo. Rev. Stat. Ann. § 2-4-303 (West) ("repeal, revision, amendment, or consolidation"); S.C. Code Ann. § 2-7-50 ("altering, amending, adding to or repealing"); Md. Ann. Code art. 1, § 3 ("repeal, or the repeal and reenactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal"); Wash. Rev. Code Ann. § 10.01.040 (West) ("whether such repeal be express or implied"); Mich. Comp. Laws § 8.4a ("repeal of any statute or part thereof"); N.Y. Gen. Constr. Law § 93 (McKinney) (same); N.J. Stat. Ann. § 1:1-15 (West) ("repeal or alteration of any act or part of any act"); 5 Ill. Comp. Stat. 70/4 ("repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act"); Nev. Rev. Stat. Ann. § 169.235 (West) ("superseding of any law"); Cal. Gov't Code § 9608 ("termination or suspension (by whatsoever means effected)").

Act “amended” § 841(b). § 2, 124 Stat. 2372. Its use of the term “amended,” instead of “repealed,” should be seen as direct evidence of its intent not to save the prior version of § 841(b) in all pending prosecutions. *See, e.g., Dean*, 129 S.Ct. at 1853 (“[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.”); *United States v. Turkette*, 452 U.S. 576, 580 (1981) (unambiguous language must ordinarily be regarded as conclusive). Accordingly, the saving statute should not bar the application of the Fair Sentencing Act’s amendments at a time when those amendments were in effect.

B. The saving statute’s history and purpose confirm that, to the extent the statute was meant to apply beyond repeals to amendments, it was not meant to preclude the prospective application of ameliorative amendments to penalty provisions.

If it is unclear, or ambiguous, whether the saving statute reaches amendments, its history and purpose may be consulted for guidance. *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 627 (1993). A statute’s origins are also relevant, and a court should interpret a statute to achieve its aim. *United States v. Tohono O’odham Nation*, 131 S.Ct. 1723, 1730 (2011).

i. **The legislative history of the saving statute indicates that it was enacted as a general rule of statutory construction, and not to alter the substance of existing federal law.**

The 1871 Act that contained the saving statute was part of a larger project to codify all federal laws. MacKenzie, 54 Geo. L.J. at 175-76. Presidentially-appointed commissioners were asked to “revise, simplify, arrange, and consolidate” all federal laws, as well as identify “contradictions, omissions, and imperfections” within the laws. *Id.*; Cong. Globe, 41st Cong., 2d Sess. 2466 (statement of Rep. Poland).

The legislative history on the saving statute is sparse, but illuminating. Neither the House of Representatives nor the United States Senate discussed the saving statute during the debate of the 1871 Act. See Cong. Globe, 41st Cong., 2d Sess. 2464-67 (1870); Cong. Globe, 41st Cong., 3d Sess. 775-77 (1871). There was some discussion, however, on the Act’s fourth section,²² which, somewhat similar to the saving statute, provided: “whenever an act shall be repealed which repeals a former act, such former act shall not thereby be revived, unless the repealing act expressly so provides.” Cong. Globe, 41st Cong., 2d Sess. 2465. Senator Howard initially objected to this provision because it was in derogation of the common

²² This section became the third section in the final Act, but it is referred to here as the fourth section, consistent with its discussion during debate on the Act.

law. Cong. Globe, 41st Cong., 3d Sess. 775. This objection was not considered, however, because other Senators indicated that the Act's purpose was to assist the commissioners in codifying the laws and that the Act had to be passed without delay in order to serve this purpose. *Id.* at 776-77.

After the Act passed both the House and the Senate, and a few days before its enactment, Representative Poland described the undiscussed sections of the Act, including the saving statute, as establishing "a few general rules for the construction of statutes, and the effect of repealing statutes, all designed to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction." Cong. Globe, 41st Cong., 3d Sess. 1474 (1871).

Apparently, the commissioners were not satisfied with the text of the saving statute. See MacKenzie, 54 Geo. L.J. at 180-81. They sought "additions" to the statute the following year. *Id.* Unlike the saving statute, the proposed provision would have expressly applied to penalty ameliorations, thus saving harsher penalties: "The repeal of a statute shall not affect the liability of any person to criminal punishment for an act or omission commenced before the repeal takes effect; *but such act or omission may be punished in the manner and to the extent authorized by the laws in force when it was commenced.*" *Id.* at 180 (emphasis added) (citing Commissioners' Draft of the Revision of the United States Statutes (1872)). Critically, these

revisions were rejected and did not become law.²³ 54 Geo. L.J. at 180-81.

This legislative history indicates that Congress viewed the saving statute as a tool for use in drafting statutes necessary in the codification of federal law. The legislative history does not indicate that Congress sought to make broad changes to the common law with the passage of the saving statute. Rather, the rejection of the proposed revisions, which would have substantially broadened the saving statute's reach and expressly covered penalty ameliorations, indicates the opposite – “reluctance to effect broad changes” in the common law. See MacKenzie, 54 Geo. L.J. at 182.

ii. This Court has held that the saving statute was meant to abolish the common law presumption of abatement.

Although the legislative history says nothing about abatement, this Court has held that the saving statute was enacted “to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of ‘all prosecutions which had

²³ The proposal also included this provision: “3. The repeal of a statute shall not release, extinguish, or impair any vested right, contract, obligation, cause of action, debt, demand, privilege, penalty, forfeiture or liability created, arising, or incurred before the repeal takes effect.” See MacKenzie, 54 Geo. L.J. at 180.

not reached final disposition in the highest court authorized to review them.’’ *Warden v. Marrero*, 417 U.S. 653, 660 (1974); see, e.g., *Yeaton v. United States*, 5 Cranch (9 U.S.) 281, 283 (1809) (prosecution abated in light of repeal of statute); *Commonwealth v. Duane*, 1 Binn. 601, 2 Am. Dec. 497 (Pa. 1809) (same). This Court has further targeted the obviation of “technical abatement” as the saving statute’s primary purpose. *Hamm*, 379 U.S. at 314. A “technical abatement” occurred when a new statute amended a prior statute by *increasing* the penalties. *MacKenzie*, 54 Geo. L.J. at 173.

As this Court noted in *Hamm*, 379 U.S. at 314, *United States v. Tynen*, 11 Wall. (78 U.S.) 88 (1870), is an example of technical abatement. In that case, the defendant was indicted for submitting a false naturalization form and faced a term of imprisonment or a fine. *Tynen*, 11 Wall. (78 U.S.) at 90. Congress increased the penalties for the offense, however, prior to any action taken on the indictment, and, in response, this Court remanded the case with instructions to dismiss the indictment. *Id.* at 90-91, 95.

Tynen was decided after the saving statute was enacted, and so the statute was not a response to this Court’s decision in that case. See *MacKenzie*, 54 Geo. L.J. at 174-75. Nonetheless, it is not improbable to think that Congress would have wanted to close the common-law rule’s “escape hatch” that set an accused free if Congress increased the penalties for the charged offense. *Id.* at 173. “The misuse of the common-law doctrine in mere technical abatements is indeed

an illustration of judicial results which one might expect a legislature to have remedied." *Id.* at 181; *see also People v. Oliver*, 1 N.Y.2d 152, 159, 134 N.E.2d 197, 201 (N.Y. 1956) ("the common-law rule often worked to produce unjust results and defeat the obvious legislative design").

This Court has also indicated that the saving statute was meant to preclude abatement when a repealing statute *lowered* the penalties. *Marrero*, 417 U.S. at 660; *see also Bradley v. U.S.*, 410 U.S. 605, 608 (1973).²⁴ Citing three cases from the lower courts, in *Marrero*, this Court further acknowledged that the saving statute "has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of

²⁴ Neither of the cases cited in *Bradley* for the proposition that courts actually abated prosecutions in these circumstances stands for it. In *Beard v. State*, the court did not abate the prosecution, but rather saved the prior penalty because the application of the newer penalty would have violated the *Ex Post Facto* clause. 74 Md. 130, 21 A. 700, 701-02 (Md. 1891). In the other case, *Rex v. M'Kenzie*, the court did not abate the prosecutions either, but rather pronounced judgment under a lesser offense (common larceny instead of grand larceny). 168 Eng. Rep. 881, 1820 WL 2032 (K.B. 1820). Moreover, the two cases cited in *Marrero* were based on *ex post facto* concerns as well. *See Lindzey v. State*, 65 Miss. 542, 5 So. 99, 100 (1888); *Hartung v. People*, 22 N.Y. 95, 1860 WL 7885 at *7 (1860). Nonetheless, prosecutions were abated on at least six occasions following the repeal of a statute that merely lowered the penalties. *See Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 126 n.41-43 (Nov. 1972).

an offense." *Marrero*, 417 U.S. at 661. Yet, this Court did not suggest that the saving statute *was meant* to bar application of ameliorative criminal sentencing laws. *Id.* Nor would the legislative history support such a statement.

iii. This Court's previous suggestion that the saving statute precludes the application of ameliorative penalty amendments is infirm and ought to be reconsidered.

At common law, rather than abate prosecutions, both federal and state courts generally followed the principle that, "where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto." *Moorehead*, 198 F.2d at 53.²⁵ The amended provision was "rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones." *Steamship Co. v. Jolliffe*, 2 Wall. (69 U.S.) 450, 458-59 (1864) (quotation and citation omitted); see also *Gulf, Co. & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 506-07 (1912) ("it becomes our duty to recognize the changed situation, and . . . to apply the intervening law"); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J.,

²⁵ The defendant in *Moorehead* conceded that the saving statute abrogated this rule. Mr. Dorsey does not.

concurring) (noting “presumption of retroactivity” with respect to amendments to criminal statutes).

For instance, in *Steamship Co.*, a pilot offered to pilot an ocean steamer, but the offer was declined, entitling the pilot to half-pilotage fees under the applicable law. 2 Wall. (69 U.S.) at 455-56. The law was amended, however, after suit was brought. *Id.* at 456, 458. The State argued that the action had to abate in light of the repeal of the earlier statute. *Id.* at 456. This Court rejected the argument, holding: “[t]he new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them.” *Id.* at 458. As the dissent in that case makes clear, this Court was well aware of the common-law rule of abatement, *id.* at 464-67 (Miller, J., dissenting), but rejected it in favor of the application of the amended version of the statute, *id.* at 458 (majority opinion).

Similarly, in *Com. v. Wyman*, a case from 1853, the Massachusetts Supreme Judicial Court permitted the trial of a woman for arson despite the fact that the penalty provisions were amended prior to sentencing. 66 Mass. 237, 238-39 (1853). The court held that the amended, ameliorative penalty provisions applied, even though the conduct predated these amendments “because in the present case the whole

law was not revised, but only that part of it which imposed the punishment." *Id.* at 239.²⁶

Thus, while there might have been instances in which prosecutions were abated following an amendment that lowered a penalty, see Today's Law and Yesterday's Crime, 121 U. Pa. L. Rev. at 126 n.41-43, abatement was not the exclusive remedy. It is Mr. Dorsey's position that this common law rule of amelioration survives the saving statute; the saving statute should not operate to preclude the application of ameliorative penalty provisions in prosecutions in which the penalty has yet to be imposed.

A number of states interpret analogous state saving statutes in this manner.²⁷ Moreover, such an

²⁶ See also *People v. Oliver*, 1 N.Y.2d 152, 159-60, 134 N.E.2d 197, 201 (N.Y. 1956) ("where an ameliorative statute takes the form of a reduction of punishment for a particular crime, the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that statute."); *Turner v. State*, 870 N.E.2d 1083, 1085-86 (Ind. Ct. App. 2007) (recognizing "doctrine of amelioration"); *State v. Macarelli*, 118 R.I. 693, 698, 375 A.2d 944, 947 (R.I. 1977) (following *Oliver's* "sound judicial philosophy"); *State v. Ambrose*, 192 Neb. 285, 290, 220 N.W.2d 18, 21 (Neb. 1974).

²⁷ See, e.g., *People v. Schultz*, 435 Mich. 517, 529, 533, 460 N.W.2d 505, 510, 512 (1990) (holding that state saving statute does not preclude the application of ameliorative amendments because such an application would "gloss over the historical and philosophical underpinnings" of the statute.); *Lewandowski v. State*, 271 Ind. 4, 6, 389 N.E.2d 706, 707 (Ind. 1979) ("[E]nactment of a ameliorative sentencing amendment was, in itself, a sufficient indication of the legislative intent that it be

(Continued on following page)

interpretation is consistent with the legislative history and Congress' belief that the saving statute was a rule of construction, rather than a substantive provision. MacKenzie, 54 Geo. L.J. at 182; Cong. Globe, 41st Cong., 3d Sess. 775-77. It is also consistent with the rejection of a broader saving statute that would have expressly barred the application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of the offense. MacKenzie, 54 Geo. L.J. at 180-81.

Nor has this Court ever *applied* the saving statute to preclude the application of an amended penalty provision when that provision was in effect on the date of sentencing. In the eight cases in which this Court has been asked to apply the saving statute in the criminal context, it refused to do so in four of the cases. *Hamm*, 379 U.S. at 316-17; *Bridges v. United States*, 346 U.S. 209, 221 (1953); *Massey v. United States*, 291 U.S. 608 (1934); *United States v. Chambers*, 291 U.S. 217, 226 (1934). Of the other four, three involved whether the prosecutions should abate, not

applied to all to whom such application would be possible and constitutional, thereby obviating application of the general saving statute[.]"); *In Re Estrada*, 63 Cal. 2d 740, 748, 408 P.2d 948, 953 (Cal. 1965) ("[W]here the amendatory statute mitigates punishment and there is no [express] saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed. Neither a [general] saving clause . . . nor a construction statute . . . changes that rule."); *Oliver*, 1 N.Y.2d at 159, 134 N.E.2d at 201.

whether the defendants should get the benefit of an ameliorative penalty provision. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 399 n.10 (1972); *Great Northern Ry. Co.*, 208 U.S. at 466; *United States v. Reisinger*, 128 U.S. 398, 400 (1888).

The final case is *Marrero*, which involved a collateral attack by several defendants who sought retroactive application of a provision that eliminated a no-parole eligibility requirement in effect when the defendants committed their offenses *and* when they were sentenced. 417 U.S. at 655-56. The repealing statute in that case included a saving clause that provided, “[p]rosecutions for any violation of law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (the Act). . . .” *Id.* at 656. Because the defendants committed a “violation of law . . . prior to the effective date of (the Act),” this Court correctly held that they were not entitled to the Act’s benefits. *Id.* at 657-59.

Additionally, however, this Court acknowledged that lower courts have interpreted the saving statute to bar “the application of ameliorative criminal sentencing laws in repealing harsher ones in force at the time of the commission of an offense.” *Id.* at 661. It is unclear why this Court discussed the saving statute in light of the plain language in the repealing statute. Because the holding was unnecessary, it might be considered dicta. See *Cent. Va. Cmt. Coll. v. Katz*, 546 U.S. 356, 363 (2006); *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 399-400 (1821). At a minimum, it was not necessary to the ultimate outcome in the

case, and this Court could reconsider the matter, as it should, without disturbing the result in *Marrero*.

Upon reconsideration, it is apparent that this Court referenced the triggering event for the saving statute as “the time of the commission of the offense” because the saving clause within the repealing statute referenced the “occurr[ence]” of a “violation of law.” See *Marrero*, 417 U.S. at 661. As Section II(A) explains, the saving statute applies by its own terms only when a penalty is “incurred,” and a penalty is not incurred when the offense is committed.

Because, by its own terms, the saving statute references when a penalty is “incurred,” not when an offense is committed, and because its subject is a “repeal,” and not a “repeal or amendment” (or some other variation), the statute has not abrogated the common law rule of amelioration. If Congress amends a statute by lowering the penalties, and if this statute is in effect at the time the penalty is incurred, see Section II, the saving statute, by its own terms, should not bar its application. Indeed, because the defendants in *Marrero* were sentenced prior to the statute’s repeal, this Court correctly applied the saving statute in that case, and that is true regardless of the specific saving clause in the repealing statute. Whether the saving statute precludes the application of an ameliorative penalty amendment prior to the penalty’s imposition, however, should be considered an open question in this Court, and, in light of the saving statute’s text, history, and purposes, it should be answered in the negative.

C. The statutory principle that statutes in derogation of the common law must be strictly construed supports Mr. Dorsey's interpretation of the saving statute.

The saving statute's text, the legislative history, and this Court's precedents make clear that the saving statute, as applied, is in derogation of the common law's presumption of abatement. *Marrero*, 417 U.S. at 660; 1 U.S.C. § 109; Cong. Globe, 41st Cong., 3d Sess. 775. The same cannot be said with respect to the common law rule of amelioration, as discussed above. The saving statute's text does not refer to an "amendment," and the legislative history does not support the proposition that the saving statute was meant to preclude the application of a lower penalty at a time when that lower penalty was in effect. Moreover, to the extent this Court has stated that the saving statute bars the application of ameliorative sentencing laws, it has done so in an alternative holding which was unnecessary to the disposition of the case. *Marrero*, 417 U.S. at 657-59.

Because the saving statute is in derogation of the common law, it should be strictly construed. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *Reisinger*, 128 U.S. at 401. As such, the saving statute should be interpreted to effect its purpose, while retaining other aspects of the common law. *United States v. Texas*, 507 U.S. 529, 534 (1993); *Isbrandtsen Co.*, 343 U.S. at 783. "When Congress does expressly repeal a statute, we should not read a saving clause so broadly that it encompasses much more than is

necessary to achieve its general purpose – preventing the abatement of prosecutions which, at common law, would otherwise have resulted from the repeal of a statute or from a change in the definition of an offense.” *United States v. McGarr*, 461 F.2d 1, 4 (7th Cir. 1972).

Accordingly, this Court should construe the saving statute strictly as a presumption against abatement in cases of repeal, and a presumption against technical abatement in cases of amendment. It should not be interpreted to abrogate the common law rule of amelioration. Instead, ameliorative amendments to penalty provisions should apply prospectively upon their enactment in all cases in which the penalty has yet to be imposed.

D. Under the rule of lenity, Mr. Dorsey should have been sentenced under the Fair Sentencing Act’s amended penalty provisions.

Mr. Dorsey maintains that the text of the saving statute is clear and unambiguous in that it has no application when Congress expressly “amends” a statute. See Section III(A), *supra*. The history and purposes of the statute confirm that it should not apply in a case, such as this one, that involves an ameliorative amendment to a criminal penalty provision in existence at the time punishment is imposed. See Section III(B) & (C), *supra*. Nonetheless, if this Court finds that the statute is ambiguous, the rule of

lenity requires that the statute be interpreted in Mr. Dorsey's favor.

Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 130 S.Ct. 2896, 2932 (2010). "[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *United States v. R.L.C.*, 503 U.S. 291 (1992). It is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quotations omitted).

Here, a lenient reading of the saving statute would favor Mr. Dorsey. Congress has recognized the unfairness in the prior version of § 841(b), and it has remedied that unfairness, at least partially, with the passage of the Fair Sentencing Act. The Fair Sentencing Act was in full force and effect when Mr. Dorsey was sentenced. To preclude its application in this case was, and would be, "gratuitously silly." *Holcomb*, 657 F.3d at 463 (Posner, J., dissenting).

Instead, consistent with this Court's decision in *Hamm v. City of Rock Hill*, the lower courts should have applied the Fair Sentencing Act "to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." 379 U.S. at 313-16. *Id.* at 313; see also *Landgraf*, 511 U.S. at 276 n.30 ("the government should accord grace to private parties disadvantaged

by an old rule when it adopts a new and more generous one.”).

Hamm involved the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 244 (1964), and whether its passage abated state convictions for trespass, based on sit-in demonstrations at segregated lunch counters. 379 U.S. at 307-08. This Court held that it did, despite the saving statute, noting that the saving statute should not apply to save a repealed statute when that statute undermines important public policy. *Id.* at 317. The same is true in this case. The Fair Sentencing Act corrected a sentencing scheme that adversely affected African-Americans for no sound reason. See *Kimbrough*, 552 U.S. at 97-98. While trafficking in crack cocaine is not an act of civil disobedience, Mr. Dorsey has not asked this Court, or any other court, to vacate his underlying conviction. He understands that his actions are as illegal today as they were two years ago. But that does not mean that his sentence should stand under an unfair provision that discriminated on the basis of race. See *Hamm*, 379 U.S. at 314-16.

Instead, “[t]he more lenient interpretation must prevail.” *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring). The more lenient interpretation is to apply the Fair Sentencing Act to all those sentenced after the Fair Sentencing Act’s enactment. To do otherwise would be “unnecessarily vindictive.” *Hamm*, 379 U.S. at 313.

In the end, in light of its text, and based on its origins, its history, and its purposes, the saving statute should be construed strictly as a presumption against abatement, including technical abatement, and nothing more. It should not be construed to preclude the application of an ameliorative amendment at a time when that amendment was in full force and effect. *Steamship Co.*, 2 Wall. (69 U.S.) at 458-59; *Dennis*, 224 U.S. at 506-07; *Lewandowski*, 271 Ind. at 6, 389 N.E.2d at 707; *Schultz*, 435 Mich. at 533, 460 N.W.2d at 512; *In Re Estrada*, 63 Cal. 2d at 748, 408 P.2d at 953; *Oliver*, 1 N.Y.2d at 160, 134 N.E.2d at 201-02; *Wyman*, 66 Mass. at 238-39; see also *Turner*, 870 N.E.2d at 1085-86; *Macarelli*, 118 R.I. at 698, 375 A.2d at 947. In such an instance, the court should apply the lower penalties in effect at the time of sentencing. *Id.* Because Mr. Dorsey was sentenced after the Fair Sentencing Act's enactment, he should have been sentenced under its provisions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and this case should be remanded for resentencing under the Fair Sentencing Act.

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RESPONDENT'S BRIEF

In the Supreme Court of the United States

EDWARD DORSEY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES
SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applies in all initial sentencing proceedings after the effective date of the Act.

(I)

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In the Supreme Court of the United States

No. 11-5683

EDWARD DORSEY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 11-5271

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES SUPPORTING PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in No. 11-5683 (Dorsey Pet. App. A1-A4) is reported at 635 F.3d 336. The order of the court of appeals denying rehearing (Pet. App. B1-B5) is reported at 646 F.3d 429.

The opinion of the court of appeals in No. 11-5721 (Hill Pet. App. A1-A2) is not published in the Federal Reporter but is available at 417 Fed. Appx. 560.

JURISDICTION

The judgment of the court of appeals in No. 11-5683 was entered on March 11, 2011. A petition for rehearing was denied on May 25, 2011. The petition for a writ of certiorari was filed on August 1, 2011, and was granted on November 28, 2011.

The judgment of the court of appeals in No. 11-5721 was entered on April 7, 2011. The petition for a writ of certiorari was filed on July 1, 2011, and was granted on November 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, as well as pertinent provisions of 21 U.S.C. 841; Section 21(a) of the Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266 (28 U.S.C. 994 note); and the Sentencing Guidelines, are set out in the appendix to this brief. App., *infra*, 5a-50a.

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner Dorsey (No. 11-5683) was convicted on one count of possessing with intent to distribute 5.5 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner Hill (No. 11-5721) was convicted after a jury trial in the United States District Court for the Northern District of Illinois on one count of distributing 50 or more grams of crack cocaine, also in violation of 21 U.S.C. 841(a)(1). On August 3, 2010, after both petitioners had been convicted but before either had been sentenced, the President signed into law the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, which

amended, *inter alia*, the drug quantities that trigger mandatory minimum penalties for trafficking in crack cocaine. In each case, the district court refused to sentence petitioner under the FSA and imposed a mandatory minimum sentence under pre-FSA law. The court of appeals affirmed.

I. STATUTORY BACKGROUND

Powder cocaine (cocaine hydrochloride) and crack cocaine (a form of cocaine base) are “two forms of the same drug”: they contain the same active ingredient and produce the same physiological and psychotropic effects. *DePierre v. United States*, 131 S. Ct. 2225, 2228 (2011); *Kimbrough v. United States*, 552 U.S. 85, 94 (2007). Nonetheless, as this Court recently discussed, Congress required more than 20 years ago that offenses involving “cocaine base” be “handled very differently for sentencing purposes,” resulting in sentences for crack cocaine offenders “three to six times longer than those for powder offenses involving equal amounts of drugs.”¹ 552 U.S. at 94. After two decades of experience produced “almost universal criticism” of that sentencing disparity, U.S. Sentencing Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (May 2007) (2007 Report), Congress enacted the FSA in 2010 “[t]o restore fairness to Federal cocaine sentencing.” FSA Pmbl., 124 Stat. 2372.

¹ The term “cocaine base” in Section 841(b)(1) is not limited to crack cocaine, but encompasses all varieties of “cocaine in its chemically basic form.” *DePierre*, 131 S. Ct. at 2237.

A. Adoption Of The 100-to-1 Ratio

In the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, Congress created the basic tiered scheme of five- and ten-year mandatory minimum penalties for drug-trafficking offenses that remains in effect today. *Kimbrough*, 552 U.S. at 95. Under that scheme, both the maximum authorized punishment and the mandatory minimum term of incarceration increases with the drug quantity attributable to an offender. The threshold quantities required to trigger the mandatory minimum penalties vary by the drug. See generally 21 U.S.C. 841(b)(1)(A)-(C) (2006 & Supp. IV 2010).

The 1986 Act was adopted in a time of “great public concern” over the proliferation of crack cocaine, which was then a relatively new drug. *Kimbrough*, 552 U.S. at 95. “Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members’ minds a problem of overwhelming dimensions.” *Ibid.* (quoting U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 121 (Feb. 1995) (1995 Report)). Consequently, in setting the drug quantities that triggered the 1986 Act’s mandatory minimum prison sentences, Congress adopted a 100-to-1 ratio that treated every gram of crack cocaine as equivalent to 100 grams of powder cocaine: for trafficking in 5 grams of crack cocaine or 500 grams of powder cocaine, the 1986 Act required a minimum sentence of five years in prison, see 21 U.S.C. 841(b)(1)(B) (2006); for offenses involving 50 grams of crack cocaine or 5 kilograms of powder cocaine, it imposed a mandatory minimum penalty of ten years, see 21 U.S.C. 841(b)(1)(A) (2006).

The United States Sentencing Commission (Sentencing Commission or Commission), which in 1986 was in the process formulating the first version of the Sentencing Guidelines, responded by incorporating the 100-to-1 ratio into the drug quantity table in Section 2D1.1(c) of the Guidelines. Using the statutory threshold quantities for five- and ten-year mandatory minimum sentences as “reference points,” the Commission extrapolated upward and downward to derive proportional sentences for other drug quantities. 1995 Report 126; see *Kimbrough*, 552 U.S. at 96-97. Consequently, “[t]he 100-to-1 quantity ratio was maintained throughout the offense levels.” 1995 Report 126.

In 1988, consistent with the 100-to-1 ratio, Congress added a mandatory term of life in prison for offenders who, having two prior felony drug convictions, distributed at least 50 grams of cocaine base or 5000 grams of powder cocaine. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6452(a)(2), 102 Stat. 4371. In the same Act, Congress adopted a mandatory minimum penalty of five years of imprisonment for the simple possession of crack cocaine—the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance. § 6371, 102 Stat. 4370 (21 U.S.C. 844(a) (2006)); see 1995 Report 123-125.

B. The Sentencing Commission’s Escalating Criticism Of The 100-to-1 Ratio

The adoption of a 100-to-1 ratio in the treatment under federal law of “two easily convertible forms of the same drug” produced a variety of “extreme anomalies in sentencing.” 1995 Report 197. Because of that ratio, for example, a major trafficker in powder cocaine could receive a shorter prison sentence than the street-level

dealers who bought from that trafficker and converted the powder cocaine to crack. See *Kimbrough*, 552 U.S. at 95. Indeed, under the 100-to-1 ratio, the amount of powder cocaine required to trigger a five-year mandatory minimum prison sentence for a single powder offender—500 grams—could be converted into enough crack cocaine to trigger the same five-year mandatory minimum sentence for 89 crack offenders.² 1995 Report 160. The mandatory minimum penalty for simple possession of crack cocaine generated similarly striking anomalies. A first-time conviction for the simple possession of five grams of crack cocaine, for example, triggered a mandatory minimum penalty of five years in prison and a maximum of 20 years. See 21 U.S.C. 844(a) (2006). By contrast, the *maximum* penalty for the first-time simple possession of *any* quantity of powder cocaine was one year in prison, and many such offenders avoided incarceration altogether. *Ibid.*; see 1995 Report 151. It soon became apparent, moreover, that the impact of these sentencing disparities fell disproportionately on racial minorities. See *id.* at 192 (finding that minorities constitute “the vast majority of those persons most affected by such an exaggerated ratio”).

These and other sentencing anomalies created by the 100-to-1 ratio generated a chorus of criticism. See 1995 Report 1. In 1994, Congress responded by directing the Sentencing Commission to prepare a report describing “the differences in penalty levels that apply to different forms of cocaine” and “any recommendations that the Commission may have for retention or modification of such differences in penalty levels.” Violent Crime Con-

² One gram of pure powder cocaine converts to approximately 0.89 grams of crack cocaine. 1995 Report 14.

trol and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 2097. The Commission eventually issued four separate reports, each of which concluded that the 100-to-1 ratio could not be justified and that congressional action was required.

1. In February 1995, in response to the 1994 congressional directive, the Sentencing Commission published a comprehensive report on federal sentencing policy for cocaine offenses. See 1995 Report. After reviewing the available empirical data in light of the policy concerns that originally animated Congress's adoption of heightened penalties for crack cocaine, see *id.* at 146-160, 180-195, the Commission "strongly recommend[ed] against a 100-to-1 quantity ratio." *Id.* at 198. The Commission explained that its "central basis" for rejecting the 100-to-1 ratio was the creation of "extreme anomalies in sentencing produced by such a high differential in penalties between two easily convertible forms of the same drug." *Id.* at 197. The Commission similarly found that the mandatory minimum penalty for simple possession of crack cocaine had "created sentencing anomalies and unwarranted disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act [of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987]." 1995 Report 198.

Shortly thereafter, the Sentencing Commission proposed an amendment to the Guidelines that would have implemented a 1-to-1 quantity ratio for crack and powder cocaine offenses. See 60 Fed. Reg. 25,075-25,077 (1995). Congress disapproved the amendment, expressing its sense that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of

powder cocaine.” Act of Oct. 30, 1995, Pub. L. No. 104-38, §§ 1 & 2(a)(1)(A), 109 Stat. 334. But at the same time, Congress directed the Sentencing Commission to “propose [a] revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in [18 U.S.C. 3553(a)].” § 2(a)(2), 109 Stat. 335. In the accompanying House committee report, legislators acknowledged that “the current 100-to-1 quantity ratio may not be the appropriate ratio.” H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995). The committee expressed concern, however, that amending the Sentencing Guidelines for crack cocaine offenses without changing the corresponding mandatory minimum penalties would “create gross sentencing disparities,” because “[s]entences just below the statutory minimum would be drastically reduced, but mandatory minimums would remain much higher.” *Ibid.*

2. The Sentencing Commission responded in 1997 with a report in which it “firmly and unanimously” reiterated its conclusion that, “although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified.” U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (Apr. 1997) (1997 Report). The Commission particularly urged that the five-gram quantity trigger for a five-year minimum sentence for crack cocaine offenders was “too low,” *id.* at 7, and emphasized that the racially disparate impact of the 100-to-1 penalty resulted in a widespread “perception of unfairness and inconsistency” in federal sentencing, *id.* at 8. The Commission accord-

ingly recommended that Congress adopt a ratio of approximately 5-to-1. *Id.* at 9.

3. In 2002, after Congress failed to act, the Sentencing Commission issued an updated report in which it “again unanimously and firmly conclude[d]” that the 100-to-1 ratio should be “decreas[ed] substantially.” U.S. Sentencing Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* viii (May 2002) (2002 Report). The Commission—which by 2002 no longer included any of the commissioners who had authored the earlier reports, see *id.* at 1 n.4—explained that “[t]he 100-to-1 drug quantity ratio was established based on a number of beliefs” about the dangers of crack cocaine “that more recent research and data no longer support.” *Id.* at 91. As a result, the Commission concluded, “the offense seriousness of most crack cocaine offenders is overstated,” and “a differential this extreme is unjust.” *Id.* at 100. Furthermore, “[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000.” *Id.* at 102. Thus, the Commission concluded, to the extent that the 100-to-1 ratio “results in unduly severe penalties for most crack cocaine offenders, the effects of that severity fall primarily upon black offenders.” *Id.* at 103.

The Commission accordingly proposed “a three-pronged approach for revising federal cocaine sentencing policy”: (i) increase the threshold quantities of crack cocaine required to trigger statutory penalties in order to achieve at most a 20-to-1 ratio; (ii) in exchange, adopt new sentencing enhancements targeted at the most serious drug offenders; and (iii) maintain the same trigger quantities for powder cocaine offenders, understanding that the new sentencing enhancements would

in practical effect increase the penalty for many powder traffickers as well. 2002 Report viii. The Commission also “unanimously reiterate[d]” its prior finding that the five-year mandatory minimum penalty for simple possession of crack cocaine “is unjustified and should be repealed.” *Id.* at 109.

4. Finally, in 2007, the Commission determined that “the problems associated with the 100-to-1 drug quantity ratio” were “so urgent and compelling” that the Commission would “partially address some of the problems” on its own. 2007 Report 9. The Commission announced that it would amend the drug quantity table in Section 2D1.1(c) of the Guidelines to reduce the base offense level for crack cocaine offenses by two levels. See 72 Fed. Reg. 28,571-28,573 (2007). This had the effect of providing Guidelines ranges that included (rather than exceeded) the statutory minimum penalties, but still continued to “fit within the existing statutory penalty scheme.” 72 Fed. Reg. at 28,573. The Commission emphasized that it viewed this change “only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio” and that “[a]ny comprehensive solution” would require legislative action. *Ibid.*

The Commission then issued a fourth report in which it “unanimously and strongly urge[d] Congress to act promptly” to revise the 100-to-1 ratio and repeal the mandatory minimum penalty for simple possession. 2007 Report 8. The Commission reaffirmed the “core findings” from its previous reports, *id.* at 7, including (1) that the 100-to-1 ratio “overstate[s] the relative harmfulness of crack cocaine”; (2) that the mandatory minimum penalties for crack cocaine offenses “sweep too broadly and apply most often to lower level offenders”;

(3) that the penalty scheme “fail[s] to provide adequate proportionality”; and (4) that “[t]he current severity of crack cocaine penalties mostly impacts minorities.” *Id.* at 8. “Based on these findings,” the Commission reiterated its conclusion that “the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.” *Ibid.*

The Commission observed that this Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), had engendered significant litigation over “whether, and how, sentencing courts should consider the 100-to-1 drug quantity ratio,” which was by then the target of “almost universal criticism.” 2007 Report 1, 2. Cf. *Spears v. United States*, 555 U.S. 261, 265-266 (2009) (per curiam) (reaffirming that, after *Booker* and *Kimbrough*, “district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines”). The Commission urged that, rather than permit inconsistent, case-by-case variations from the statutory ratio, Congress should enact “a uniform remedy to the problems created by the 100-to-1 drug quantity ratio” that would “better promote the goals of the Sentencing Reform Act, including avoiding unwarranted sentence disparities among defendants with similar criminal records.” 2007 Report 1-2.

Finally, the Commission urged Congress to include in any legislation implementing its recommendations a grant of “emergency amendment authority” to permit the Commission to “incorporate the statutory changes in the federal sentencing guidelines.” 2007 Report 9. Such emergency authority, the Commission explained, “would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.” *Ibid.*

C. The Fair Sentencing Act

The President signed the Fair Sentencing Act into law on August 3, 2010. Entitled an act “[t]o restore fairness to Federal cocaine sentencing,” Pmbl., 124 Stat. 2372, the FSA essentially implements the Sentencing Commission’s 2002 proposal for cocaine sentencing reform. See 2002 Report 104; accord 2007 Report 8 & n.26. The FSA passed the Senate by unanimous consent and the House by voice vote.

Section 2 of the Act, entitled “Cocaine Sentencing Disparity Reduction,” increases the threshold quantities of crack cocaine required to trigger five- and ten-year mandatory minimum penalties from 5 and 50 grams to 28 and 280 grams, respectively, leaving the corresponding quantities of powder cocaine unchanged at 500 and 5000 grams. 124 Stat. 2372. The FSA thus replaces the 100-to-1 ratio with a ratio of approximately 18-to-1.³

Section 3 of the FSA repeals the mandatory minimum sentence for simple possession of crack cocaine. 124 Stat. 2372.

³ Congress’s selection in the FSA of 28 grams as the trigger for the five-year mandatory minimum penalty appears to reflect evidence that wholesale crack distributors typically trade in quantities of one ounce (i.e., approximately 28 grams) or more. See 2007 Report 18, 84 n.124; see also 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (Rep. Lungren) (“According to narcotics officers I have spoken with, you want to reach the wholesale and mid-level traffickers who often trafficked in 1-ounce quantities. That is why [the FSA] would raise the amount of crack cocaine necessary to trigger a mandatory 5-year sentence from 5 grams to 28 grams, which is close to the 1 ounce.”).

Sections 4 through 6 of the FSA implement the Commission's recommendation to adopt targeted increases in penalties for more culpable offenders. See 2002 Report 104. The Act thus substantially increases the maximum fines permitted for drug-trafficking offenses, § 4, 124 Stat. 2372-2373, and directs the Sentencing Commission to review and amend the Guidelines to ensure an additional enhancement is provided for certain conduct during drug-trafficking crimes, such as the use of violence or the distribution of drugs to unusually vulnerable persons, §§ 5-6, 124 Stat. 2373-2374. Section 7 of the FSA directs the Commission to cap or reduce the base offense level for defendants who receive a minimal role adjustment. 124 Stat. 2374. Sections 9 and 10 require certain reports to Congress, including a report within five years of the Act's passage on the "impact" of its changes. 124 Stat. 2374-2375.

Finally, Congress granted "emergency authority" to the Sentencing Commission to implement the FSA immediately and "conform[]" the Guidelines to "applicable law." § 8, 124 Stat. 2374. The Act thus not only permits the Commission to dispense with the 180-day period for congressional review of Guidelines amendments normally required under 28 U.S.C. 994(p), but specifically directs the Commission to act "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act." § 8, 124 Stat. 2374.

D. The Emergency Guidelines Amendments

The Sentencing Commission complied with Congress's directive in Section 8 of the FSA by issuing emergency Guidelines amendments that became effective on November 1, 2010. 75 Fed. Reg. 66,188 (2010). Among other changes, the Commission amended the

relevant crack cocaine quantities in the Drug Quantity Table in Section 2D1.1(c), which specifies the base offense level for trafficking offenses involving particular amounts of drugs, to reflect the FSA's 18-to-1 ratio. See *id.* at 66,189, 66,191. Under the Sentencing Reform Act, these amended Guidelines became immediately effective in all initial sentencing proceedings conducted on and after November 1, 2010, regardless of the date of the underlying offense. See 18 U.S.C. 3553(a)(4)(A)(ii).⁴

II. THE PRESENT CONTROVERSIES

A. *Dorsey* (No. 11-5683)

1. In August 2008, petitioner Dorsey was arrested after selling crack cocaine to a government informant at a motel in Kankakee, Illinois. Dorsey J.A. 48-49. A federal grand jury in the Central District of Illinois indicted petitioner on one count of possessing with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Dorsey J.A. 9. The government subsequently filed a notice under 21 U.S.C. 851(a)(1) stating that petitioner was subject to enhanced statutory penalties because he had previously been convicted of two felony drug offenses. Dorsey J.A. 11-12.

⁴ The Commission later submitted to Congress a permanent version of the emergency FSA Guidelines amendments. See 76 Fed. Reg. 24,960 (2011). Congress did not intervene, and the permanent amendments became effective on November 1, 2011. See *ibid.* The Commission also determined, pursuant to its authority under 28 U.S.C. 994(u), that the amended Guidelines would be made retroactively applicable to offenders already serving terms of imprisonment for crack cocaine offenses. 76 Fed. Reg. 41,333-41,334 (2011); see 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10.

In April 2010, petitioner waived his right to a jury trial and stipulated that he had knowingly possessed crack cocaine with the intent to distribute. See 09-cr-20003 Docket entry Nos. 14, 16 (C.D. Ill. Apr. 9, 2010). The district court scheduled a bench trial to determine the amount of crack cocaine petitioner had possessed. On June 3, 2010, the day of the scheduled trial, petitioner elected to enter an open plea of guilty. See Dorsey J.A. 21. During his plea colloquy, petitioner admitted to possessing 5.5 grams of crack cocaine at the time of his arrest. *Id.* at 29, 46-48. Petitioner also acknowledged that, given his prior felony drug convictions, he faced a mandatory minimum penalty of ten years in prison under the law then in effect. *Id.* at 41-43; see 21 U.S.C. 841(b)(1)(B) (2006).

2. At his sentencing hearing on September 10, 2010, petitioner urged the district court to apply the revised penalty scheme provided by the FSA, which had become effective one month earlier. See Dorsey J.A. 54-55, 69, 70. Because the Sentencing Commission had not yet issued its emergency Guidelines amendments, it was undisputed that the court would apply the pre-FSA Guidelines. See 18 U.S.C. 3553(a)(4)(A)(ii). But under the FSA, petitioner would face no mandatory minimum penalty because he possessed less than 28 grams of crack cocaine. See 21 U.S.C. 841(b)(1)(B) (Supp. IV 2010). Consequently, petitioner would be free to argue for a sentence substantially lower than what the pre-FSA Guidelines would otherwise advise. See *Spears*, 555 U.S. at 265-266.

The district court rejected petitioner's request and sentenced him under the version of 21 U.S.C. 841(b) in effect at the time of his offense. See Dorsey J.A. 70. Because petitioner's advisory Guidelines range was be-

low the pre-FSA mandatory minimum penalty of ten years, see *id.* at 67-68, the district court sentenced petitioner to serve 120 months in prison, *id.* at 80, 85.

3. The court of appeals affirmed. Dorsey Pet. App. A1-A4. The court consolidated petitioner's appeal with that of another crack cocaine offender, Anthony Fisher, who had been both convicted and sentenced before the enactment of the FSA. The court of appeals concluded that Fisher's effort to invoke the FSA was foreclosed by the court's earlier decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), cert. denied, 131 S. Ct. 2121 (2011), which had held that the general federal saving statute, 1 U.S.C. 109, prevents offenders who were sentenced before August 3, 2010, from challenging their sentences based on the amendments made by the FSA. Dorsey Pet. App. A3; see *Bell*, 624 F.3d at 814-815. Section 109 provides that the repeal or amendment of a statute does not extinguish any penalty or liability under the repealed law "unless the repealing Act shall so expressly provide." 1 U.S.C. 109.

The court of appeals then rejected petitioner's argument that, notwithstanding Section 109, the FSA's text and history "necessar[ily] impl[y] that the FSA must be applied * * * to sentences imposed *after*" the date the FSA became effective, regardless of when the offense occurred. Dorsey Pet. App. A3 (emphasis added). Concluding that Congress failed to "drop[]" any "hint" that it "wanted the FSA * * * to apply to not-yet-sentenced defendants convicted on pre-FSA conduct," the court of appeals declared that "the FSA does not apply retroactively" and that "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Id.* at A4.

B. Hill (No. 11-5721)

1. In March 2007, petitioner Hill sold approximately 53.3 grams of crack cocaine to a government informant. Hill Presentence Investigation Report (PSR) 4. In June 2008, he was arrested, and a federal grand jury in the Northern District of Illinois returned a one-count indictment charging him with distributing 50 grams or more of cocaine base in violation of 21 U.S.C. 841(a)(1). PSR 3; see Hill J.A. 6. After a jury trial in April 2009, petitioner was convicted. *Id.* at 83.

2. At petitioner's sentencing hearing on December 2, 2010, the district court stated that, in the absence of an applicable mandatory minimum, the court would have sentenced petitioner to serve 51 months in prison. Hill J.A. 69. The court recognized, however, that the amount of crack cocaine involved in petitioner's offense (53.3 grams) subjected him to a mandatory minimum sentence. *Ibid.* Under the law in effect at the time of petitioner's offense, the mandatory minimum sentence for distributing 50 or more grams of crack cocaine was ten years of imprisonment. See 21 U.S.C. 841(b)(1)(A) (2006). After the FSA, however, the mandatory minimum penalty for the same quantity is five years in prison. See 21 U.S.C. 841(b)(1)(B) (Supp. IV 2010).

Petitioner argued that Congress intended the FSA to apply in all sentencing proceedings after the effective date of the Act. Hill J.A. 64-68. The district court indicated that it might have agreed with petitioner and imposed the post-FSA mandatory minimum sentence of 60 months, but it believed it was precluded under Seventh Circuit precedent from applying the FSA to pre-enactment offenders. *Id.* at 63, 68-69. The court therefore sentenced petitioner to serve 120 months in

prison, the mandatory minimum penalty under pre-FSA law. *Id.* at 78, 85.

3. The court of appeals affirmed. Hill Pet. App. A1-A2. In an unpublished order, the court concluded that petitioner's sole argument on appeal—that the FSA "should apply to any defendant sentenced after its enactment, even if the underlying crime was committed before"—was foreclosed by the court's decision in petitioner Dorsey's case. *Id.* at A2.

C. Subsequent Proceedings

1. Petitioner Dorsey sought rehearing en banc, which the court of appeals denied. Dorsey J.A. 103-115. Judge Williams, joined by Judge Hamilton, dissented. She concluded that 1 U.S.C. 109 was inapplicable because the "fair implication" of the FSA, as revealed in Section 8 of the Act, was that Congress intended "to have the FSA apply to those individuals yet to be sentenced." Dorsey J.A. 107-108, 111. Judge Williams explained that Congress was aware that the new emergency Guidelines would apply immediately in pending cases, and she reasoned that Congress's desire to ensure "'consistency' between the guidelines and the statute * * * signals an intent to apply the FSA to pending cases just as the guidelines would be." *Id.* at 108.

2. At the time of the decisions below, the position of the United States was that 1 U.S.C. 109 required that pre-enactment offenders, such as petitioners, remain subject to the pre-FSA mandatory minimum penalty scheme because Section 109 "requires Congress to 'expressly provide' for retroactive application of an ameliorative penalty provision in order to avoid the default rule" (emphasis omitted) and "[t]he FSA con-

tains no such provision.” 11-5683 Gov’t C.A. Br. 14. In July 2011, however, the United States revisited its position in light of differing judicial decisions on the application of the FSA to pre-enactment offenders in post-FSA sentencing. Compare, e.g., Dorsey Pet. App. A2-A4 (FSA inapplicable) with, e.g., *United States v. Douglas*, 644 F.3d 39, 42-44 (1st Cir. 2011) (FSA mandatory minimum penalties apply in all initial sentencing following the November 1, 2010 emergency Guidelines amendments).⁵ In a memorandum issued to all federal prosecutors on July 15, 2011, the Attorney General concluded that, while the FSA does not apply to sentences already imposed, the Act’s “new mandatory minimum sentencing provisions [apply] to all sentencing that occur on or after August 3, 2010, regardless of when the offense conduct took place.” App., *infra*, 3a. Federal prosecutors advised the courts, including the court of appeals below, of the revised view of the United States.

3. Following the Attorney General’s decision, the Seventh Circuit considered whether to grant rehearing en banc to overrule the decision below in No. 11-5683. The court divided evenly and thus denied rehearing en banc. *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

⁵ The Third Circuit later held that the FSA applies in all post-FSA sentencing, *United States v. Dixon*, 648 F.3d 195, 203 (2011), as did a panel of the Eleventh Circuit in *United States v. Rojas*, 645 F.3d 1234, 1236, vacated on the grant of rehearing en banc, 659 F.3d 1055 (2011). The Fifth and Eighth Circuits, in contrast, held that the FSA’s statutory penalties apply only to post-FSA conduct. *United States v. Tickles*, 661 F.3d 212, 215 (5th Cir. 2011); *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011).

a. Chief Judge Easterbrook, joined by four members of the court, voted to deny rehearing. He recognized that Congress can override Section 109, and apply a new ameliorative law to pre-enactment conduct, without an “express” provision to that effect. *Holcomb*, 657 F.3d at 448. He believed, however, that a law cannot be “partial[ly] retroactiv[e]” under Section 109 and that, therefore, to say that the FSA is “not fully retroactive is to say that Congress did *not* supersede § 109.” *Ibid.* He also concluded that Congress’s directive to the Commission in Section 8 of the FSA, “which tells the Commission to get a move on in revising its Guidelines, does not imply anything about when the new minimum and maximum sentences go into force.” *Id.* at 450.

b. Judge Williams, also joined by four members of the court, dissented. She explained that “[o]nly one reasonable implication can be drawn from section 8 of the Act,” which requires the Commission to exercise emergency authority to issue “conforming amendments” to the Guidelines as necessary “to achieve consistency with other guideline provisions and applicable law.” *Holcomb*, 657 F.3d at 456. Because Congress was aware that sentencing courts use the Guidelines in effect on the day of sentencing, 18 U.S.C. 3553(a)(4)(A)(ii), she reasoned, Congress must have intended new Guidelines based on an 18-to-1 ratio to “take effect right away, even in sentencing where the offender’s conduct pre-dated the Act.” 657 F.3d at 456. It would make no sense, Judge Williams explained, for such defendants nevertheless to be “subject to pre-FSA 100:1 mandatory minimums.” *Ibid.* That result, she argued, does not achieve the “consistency” between the Guidelines and “applicable law” that Congress required; “[i]t achieves the opposite.” *Id.* at 457. Accordingly, “[t]he necessary

implication of the [FSA] is that its mandatory minimums apply in all sentencing after its passage.” *Id.* at 459-460.

c. Judge Posner, in addition to joining Judge Williams’s opinion, filed his own dissent from the denial of rehearing en banc. He emphasized that “unless the Act’s revised mandatory minimum sentences are also applicable” to offenders sentenced under the amended Guidelines, those offenders “will receive sentences in excess of the sentencing guidelines that Congress * * * intended would apply to such defendants.” *Holcomb*, 657 F.3d at 462. That result would thwart Congress’s direction to “the Sentencing Commission to make haste to conform [the Guidelines] to the new, more lenient statutory minimums.” *Ibid.* Judge Posner illustrated these “perverse results” with tables demonstrating that, for many defendants, the pre-FSA mandatory minimums would render the new Guidelines of no consequence—a “senseless” outcome. *Id.* at 461 (citation omitted).

SUMMARY OF ARGUMENT

Congress enacted the Fair Sentencing Act to remove from federal sentencing law the disproportionate and racially disparate sentencing effects of the 100-to-1 ratio. It therefore directed the Sentencing Commission to conform the Guidelines to the new “applicable law” in the amended statutory provisions “as soon as practicable.” FSA § 8, 124 Stat. 2374. The text and structure of the FSA, together with its history and purposes, make clear that, notwithstanding the general federal saving statute, 1 U.S.C. 109, Congress intended the FSA’s revised mandatory minimums to be effective immediately in sentencing proceedings following its

enactment. Petitioners, who had not yet been sentenced when the FSA became law, were entitled to be sentenced according to its terms.

A. Congress expressed its intent to make its repeal of the 100-to-1 ratio immediately effective by directing the Sentencing Commission to issue “emergency” “conforming amendments” “as soon as practicable” to “achieve consistency” between the Sentencing Guidelines and “applicable law.” Congress understood that, under the framework for federal sentencing determinations established by the Sentencing Reform Act, courts must impose a sentence in light of the Sentencing Guidelines that “are in effect on the date the defendant is sentenced,” irrespective of the date of the underlying conduct. 18 U.S.C. 3553(a)(4)(A)(ii). By directing the Commission to implement the FSA “as soon as practicable” by “conforming” the Guidelines to “applicable law,” Congress clearly expressed its intent that the FSA’s revised penalty scheme should be given effect in all initial sentencing proceedings after the date of its enactment. Congress understood that to repeal the 100-to-1 ratio without amending both the statutory mandatory minimum penalties and the Guidelines would introduce needless and unjustifiable incongruities into the law. Accordingly, Congress amended the statutory penalties in 21 U.S.C. 841(b) and directed the Commission to conform the Guidelines to those amendments “as soon as practicable,” so that a revised drug quantity table would not unnecessarily lag *behind* the statutory reforms.

As Congress additionally understood, it would make little sense to require the Commission to incorporate the 18-to-1 ratio into emergency Guidelines if the pre-FSA mandatory minimums would remain “applicable law” for

the thousands of pre-enactment offenders who would be sentenced under those emergency Guidelines. The resulting scheme would produce gross incongruities in sentences and would perpetuate the very evils Congress sought to eradicate. Indeed, for a wide variety of common drug quantities, the pre-FSA mandatory minimums would override the *entire* post-FSA Guidelines range, rendering the Guidelines that Congress directed the Commission to promulgate “as soon as practicable” essentially irrelevant.

B. The history and purposes of the Fair Sentencing Act underscore that Congress intended its repeal of the 100-to-1 ratio to be immediately effective. The evolution of the FSA informs the interpretation of the enacted text in two respects. First, Congress specifically considered and deleted from an early version of the legislation a provision that would have confined the FSA’s effect to post-enactment offense conduct only, thus implying that no such limitation was intended. Second, the debates preceding the enactment of the FSA—which passed the Senate unanimously and the House by voice vote—make plain that Congress had no further tolerance for the severely disproportionate impact of the 100-to-1 ratio on racial minorities. Requiring district courts to continue to impose mandatory minimum sentences based on that discredited ratio for years into the future would directly conflict with Congress’s core purpose in the Fair Sentencing Act: to restore fairness in cocaine sentencing by setting aside assumptions about the risks associated with crack cocaine that were, by 2010, universally recognized to be mistaken. While Congress respected finality principles by declining to disrupt sentences already imposed (thereby avoiding the significant costs to the criminal

justice system that would attend full-scale resentencings), it left no doubt that it intended to purge federal law of the racially disproportionate effects of the discredited 100-to-1 policy.

C. The default rule in 1 U.S.C. 109 does not require a different result. Section 109 reverses the common law rule of technical abatement and establishes a default presumption that federal liability incurred when a person violates an Act of Congress is not extinguished by the modification or repeal of the law regulating his conduct or prescribing the appropriate penalty. Because one legislature cannot bind the powers of a future legislature, however, the default rule created by Section 109 may be overcome if Congress indicates a contrary intent in a later statute, whether expressly or by "necessary implication." *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). Although the FSA is the sort of ameliorative legislation that triggers an inquiry under Section 109, Congress made clear its intention that the FSA's new mandatory minimum penalty provisions should apply immediately in all initial sentencing proceedings. At the same time, Section 109 preserves sentences already imposed at the time of the FSA's enactment: Congress gave no indication that it wished to incur the costs associated with full-scale resentencings. That congressional framework, which is consistent with the normal operation of the Sentencing Reform Act, should be enforced.

ARGUMENT**THE FAIR SENTENCING ACT APPLIES IN ALL INITIAL SENTENCING PROCEEDINGS AFTER ITS ENACTMENT**

The Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, rectifies a glaring disparity in federal criminal law that produced “disproportionately harsh sanctions” for crack cocaine offenses for more than 20 years. *Kimbrough v. United States*, 552 U.S. 85, 110 (2007). Congress adopted the 100-to-1 ratio in 1986 because it believed crack cocaine to be exponentially more potent, addictive, and dangerous than powder cocaine: “Congress faced what it perceived to be a new threat of massive scope.” *DePierre v. United States*, 131 S. Ct. 2225, 2235 (2011). In fact, the massive threat never materialized, and the factual assumptions that drove Congress to enact the 100-to-1 ratio proved to be unfounded. See *Kimbrough*, 552 U.S. at 97-98; 2002 Report 91. Yet the 100-to-1 ratio remained embedded in federal law, generating “extreme anomalies in sentencing” (1995 Report 197) that disproportionately imposed severe mandatory minimum penalties on racial minorities. See 2007 Report 8.

In the FSA, Congress finally accepted the recommendation of the Sentencing Commission to reduce the crack/powder ratio in 21 U.S.C. 841(b)(1) and provide emergency authority for the Commission to coordinate the Guidelines with the new drug quantity thresholds for the statutory minimum penalties. Thus, the Act more than quintupled the threshold quantities of crack cocaine necessary to trigger mandatory minimum prison terms, replacing the 100-to-1 ratio with a new ratio of approximately 18-to-1. FSA § 2, 124 Stat. 2372. It repealed the five-year mandatory minimum penalty for

simple possession of crack cocaine. § 3, 124 Stat. 2372. And it directed the Sentencing Commission to implement these changes “as soon as practicable” in “emergency” Guidelines amendments that would “achieve consistency” between the Guidelines and “applicable law.” § 8, 124 Stat. 2374.

The FSA became effective when the President signed the Act into law on August 3, 2010. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (“[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.”). The general federal saving statute, 1 U.S.C. 109, provides that the repeal or amendment of a statute does not extinguish any penalty or liability under the repealed law “unless the repealing Act shall so expressly provide.” The FSA does not expressly state that the amended provisions of 21 U.S.C. 841(b) will apply in sentencing proceedings for pre-enactment offenders. But Congress nevertheless made its intent plain in the FSA, and that intent controls notwithstanding Section 109’s express-statement rule because “one legislature cannot abridge the powers of a succeeding legislature.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). As this Court has explained, and as all members of the court of appeals recognized, see *United States v. Holcomb*, 657 F.3d 445, 448 (7th Cir. 2011) (opinion of Easterbrook, C.J.); *id.* at 455 (opinion of Williams, J.), the default rule supplied by Section 109 has no application whenever Congress has expressed a different intention, “either expressly or by necessary implication, in a subsequent enactment.” *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); see also *Warden v. Marrero*, 417 U.S. 653, 659 n.10 (1974) (“by fair implication”). Because Congress made clear in the FSA that it intended the

Act's reforms to have immediate effect, petitioners were entitled to be sentenced according to its terms. The judgment of the court of appeals in these cases must be reversed.

A. The Text, Structure, And Background Of The FSA Demonstrate Congress's Intent To Give The Act's Reforms Immediate Effect

Congress expressed its intent to make its repeal of the 100-to-1 ratio immediately effective in post-FSA sentencing by directing the Sentencing Commission to issue "emergency" conforming amendments to the Sentencing Guidelines "as soon as practicable" to "achieve consistency" between the Guidelines and "applicable law." FSA § 8, 124 Stat. 2374. That directive, in the context of the surrounding structure of federal sentencing law, is incompatible with the court of appeals' belief that Congress intended district courts to continue imposing mandatory minimum sentences under pre-FSA law.

1. Congress directed the Sentencing Commission to conform the Guidelines to "applicable law," which meant the FSA's new penalty scheme

Congress enacted the sentencing reforms in the FSA against the backdrop of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987, which established the basic framework for all federal sentencing. Under that framework, sentencing courts must consult the Sentencing Guidelines that "are in effect on the date the defendant is sentenced," irrespective of the date of the underlying conduct. 18 U.S.C. 3553(a)(4)(A)(ii). Although the Guidelines are no longer binding, see *United States v. Booker*, 543 U.S. 220 (2005), this Court has made clear that a sentencing court

must still consider the advice of the Sentencing Commission at the time the sentence is imposed. *Id.* at 245-246; see, e.g., *Gall v. United States*, 552 U.S. 38, 49 (2007) (“[T]he Guidelines should be the starting point and the initial benchmark.”).

By directing the Sentencing Commission to implement the FSA “as soon as practicable” through amendments that “conform[ed]” the Guidelines to “applicable law,” Congress necessarily implied that the FSA’s 18-to-1 penalty scheme should be given effect prospectively in *all* initial sentencing proceedings, irrespective of the date of the underlying offense conduct. In instructing the Commission to conform the Guidelines to “applicable law,” Congress necessarily meant the FSA, because the then-existing Guidelines would *already* have reflected pre-FSA sentencing law: the only “conforming amendments” necessary were those required to bring the Guidelines into alignment with the FSA itself. And by directing the Commission to “conform[]” the Guidelines to the FSA, Congress instructed the Commission to harmonize the Guidelines with the statutory penalty scheme so that the two systems would function as a logical, consistent, and coherent whole. See, e.g., *Webster’s New Int’l Dictionary of the English Language* 561 (2d ed. 1958) (“conform” means “[t]o shape in accordance with,” to “make like,” or “to bring into harmony or agreement”). Congress directed the Commission to take this step, moreover, knowing that the resulting Guidelines amendments would apply immediately in all initial sent-

encing proceedings, including those involving offenses that predated the FSA.⁶ 18 U.S.C. 3553(a)(4)(A)(ii).

The exceptional urgency of Congress's directive to the Commission in Section 8 confirms that Congress intended its repeal of the 100-to-1 ratio to be immediately effective in post-FSA sentencing. Congress gave the Commission at most 90 days to promulgate amended Guidelines. If it had believed that the Act's most significant reform—the altered mandatory minimum penalty structure—would apply only to post-Act offenders, it would have had little reason to require the Commission to act with such dispatch. While changes in the Guide-

⁶ The Guidelines recognize an exception to this rule for circumstances in which applying the Guidelines in effect on the date of sentencing would violate the Ex Post Facto Clause of the Constitution. See Sentencing Guidelines § 1B1.11(b)(1). Even assuming *arguendo* that the Ex Post Facto Clause applies to advisory Guidelines, that Clause would have ~~no~~ application to changes that decreased an offender's advisory Guidelines range, as would be true for vast numbers of crack offenders under the FSA. Accordingly, Congress would have had no reason to doubt that, under Section 3553(a)(4)(A)(ii), the emergency Guidelines amendments required by the FSA would be applicable for most or all crack offenders no later than 90 days after enactment. FSA § 8, 124 Stat. 2374. In any event, in the government's view, the advisory nature of the Guidelines after *Booker* removes any ex post facto concerns, as the Seventh Circuit has correctly held. *United States v. Demaree*, 459 F.3d 791, 794-795 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007). But see *United States v. Wetherald*, 636 F.3d 1315, 1321-1322 (11th Cir.) (advisory Guidelines can violate the Ex Post Facto Clause on an as-applied basis if they present a "substantial risk" of a more severe sentence), cert. denied, 132 S. Ct. 360 (2011); *United States v. Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); *United States v. Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011); *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Turner*, 548 F.3d 1094, 1098-1100 (D.C. Cir. 2008). No ex post facto issues are presented in this case.

lines regime would go into effect immediately and thus provide advice to sentencing courts, those courts already had—and were exercising—the authority to “reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.” *Spears v. United States*, 555 U.S. 261, 265-266 (2009) (per curiam); see also 2007 Report 1-2. The innovation of the FSA, as Congress well understood, was to reduce *statutory* barriers to fairer sentences.

On the court of appeals’ theory, Congress would have had no urgent need to accelerate the Commission’s normal procedures, under which amendments to the Guidelines may become effective six months after their submission to Congress. See 28 U.S.C. 994(p). The statute of limitations for federal drug offenses is five years. 18 U.S.C. 3282. Given the time required to discover, investigate, and prosecute drug crimes, even an offender who committed a crack cocaine offense on the day the FSA became law probably would not face sentencing for a year or longer.⁷ Indeed, if Congress had intended district courts to continue to sentence pre-enactment offenders under the law in effect at the time of the offense, it would have been more sensible for Congress to *withhold* emergency amendment authority

⁷ At the time of the FSA’s enactment, the median time between indictment and sentencing for federal drug offenses (other than marijuana offenses) was approximately 11 months. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Tbl. D-10, at 272 (2010). And a significant delay often occurs between the commission of the offense and the defendant’s arrest, even when the arrest results from a controlled drug purchase. Petitioner Hill, for example, committed his offense 15 months before he was arrested. See Hill PSR 3-4. Additional delay may also occur between arrest and indictment. See 18 U.S.C. 3161(b) (government may bring charges at any time up to 30 days after the defendant’s arrest).

from the Commission. Prior law would then have continued to govern prior conduct while the Commission formulated and proposed its amendments.

But Congress was not satisfied to wait. Instead, in Section 8 of the FSA, it (i) revived the Commission's expired authority under former Section 21(a) of the Sentencing Act of 1987 to issue emergency Guidelines amendments without waiting for congressional approval; (ii) directed the Commission to exercise that authority "as soon as practicable"; and (iii) specified that "in any event," the Commission was required to issue its amended Guidelines "not later than 90 days after the date of enactment of this Act." 124 Stat. 2374. The natural inference is that Congress intended the FSA's integrated package of reforms—new Guidelines implementing the new "applicable law"—to govern the sentencing of pre-enactment offenders, the only significant category of offenders likely to face sentencing on the 91st day after the FSA's enactment.

2. *The history of the crack/powder sentencing disparity supports the inference that Congress intended the FSA's statutory amendments to be immediately effective*

The court of appeals made no effort to reconcile its reasoning with Section 8 of the FSA. See Dorsey Pet. App. A2-A3 (acknowledging Congress's emergency directive to the Commission, yet concluding, without explanation, that Congress failed to "drop[] a hint" that it intended the FSA to "apply to not-yet-sentenced defendants convicted on pre-FSA conduct"). But in his opinion on the denial of rehearing en banc in *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011), Chief Judge Easterbrook reasoned that, while Section 8 may

have instructed the Commission to “get a move on in revising its Guidelines,” that directive does not “imply anything about when the new [statutory] minimum and maximum sentences go into force.” *Id.* at 450. That suggestion is irreconcilable not only with the FSA’s textual directive to the Commission to conform the Guidelines to “applicable law,” but also with the history of the crack/powder sentencing disparity, with which Congress was intimately familiar.

The crack/powder disparity was a “high profile area” that had previously occasioned Congress’s only exercise of its power to disapprove a revision of the Guidelines. See *Kimbrough*, 552 U.S. at 106. Congress was well aware from that experience that Guidelines amendments alone would not achieve coherent reform of federal cocaine sentencing policy. In 1995, Congress indicated its disapproval of a piecemeal solution to the problems posed by the 100-to-1 ratio by rejecting the Commission’s proposal to eliminate the 100-to-1 ratio from the Sentencing Guidelines. Congress took that step, in part, because of the “gross sentencing disparities” that would have resulted from such a change *without* simultaneously amending the statutory minimum penalties. H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995) (1995 House Report). Congress’s primary reason for disapproving the 1995 amendment was its conclusion that a 1-to-1 ratio was too low. See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334. But the House committee report also emphasized that, regardless of the correct ratio, it would make no sense for the Sentencing Commission to adopt a ratio under the Guidelines that was significantly out of proportion with the governing statutory minimum penalties: “[I]f the Commission’s guideline amendments went into effect without

Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities.” 1995 House Report 4; see also *id.* at 10 (explaining that the Commission’s proposal would “drastically reduc[e]” Guidelines sentences “while the mandatory minimums would remain much higher,” thereby “creat[ing] significant sentencing disparities for offenses involving minor quantity differences”). Congress accordingly rejected the Commission’s proposal to amend only the Guidelines and instead directed the Commission to propose a “revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes *and guidelines*. § 2(a)(2), 109 Stat. 335 (emphasis added).

As Congress understood in enacting the FSA, absent a statutory directive to the contrary, the Commission would not be legally compelled to synchronize the Guidelines with the ratios in the mandatory minimum sentencing statutes. See *Kimbrough*, 552 U.S. at 102-105. The Commission could have adopted a different ratio in the Guidelines and still maintained technical consistency with the statutory minimum penalties by virtue of Guidelines § 5G1.1(b), which provides that, “[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.” But in directing the Sentencing Commission to implement the FSA on an emergency basis through “conforming amendments” calculated to “achieve consistency” with “applicable law,” Congress could not have intended the Commission to recreate the same kind of “gross sentencing disparities” between the statutory penalties and the Guidelines that

Congress had decried in 1995.⁸ See 1995 House Report 4.

To the contrary, Congress recognized that to repeal the 100-to-1 ratio in the statute without promptly amending the Guidelines would risk introducing needless incongruities into the law. The Sentencing Commission had emphasized exactly that point to Congress in its 2007 Report. After “unanimously and strongly urg[ing]” Congress to amend the statutory minimum penalties, 2007 Report 8, the Commission further requested that Congress include in any legislation implementing its recommendations “emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines.” *Id.* at 9. Such authority, the Commission

⁸ The FSA thus creates a very different legal regime than the one that applied at the time of *Neal v. United States*, 516 U.S. 284 (1996). In that case, the Court held that the Sentencing Commission’s adoption of a method for calculating drug weight in LSD cases different from the one Congress had adopted in the mandatory minimum sentencing statutes did not alter this Court’s prior construction of the statutory methodology. *Id.* at 295-296. As the Court made clear in *Kimbrough*, this Court also “assumed” in *Neal* that the statute did not require the Commission “to adhere to the Act’s method for determining LSD weights” within the Guidelines regime. *Kimbrough*, 552 U.S. at 104-105 & n.14. In the FSA, by contrast, Congress directed the Commission to “conform[]” the Guidelines to “applicable law”—the new FSA statutory thresholds. Particularly given that the Commission had consistently “keyed” the Guidelines ranges to the crack cocaine mandatory minimums, 552 U.S. at 100 n.10, and in light of the Commission’s repeated pleas to Congress to lower the mandatory minimums so that the Commission could follow suit in the Guidelines, e.g., 2007 Report 6-9, the FSA can only be interpreted as directing the Commission to follow the FSA’s penalty structure in revising the Guidelines. The Commission’s response to the FSA understood Section 8 in precisely that fashion. See pp. 36-38, *infra*; see also App., 44a-46a, *infra*.

emphasized, “would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.” *Ibid.* (emphasis added). Congress responded in Section 8 of the FSA not only by granting to the Commission the emergency authority it had requested, but by directing the Commission to exercise that authority “as soon as practicable.”

Section 8’s direction to the Commission to issue emergency Guidelines as soon as possible was thus intended to ensure that the revised drug quantity table would not needlessly lag *behind* the FSA’s statutory changes. By changing the trigger quantities for the statutory minimum penalties in 21 U.S.C. 841(b), repealing the mandatory minimum sentence for simple possession in 21 U.S.C. 844(a), and then directing the Commission to issue “conforming amendments” to the Guidelines as soon as possible, Congress enabled the Commission to accomplish what the Commission had been unable to do 15 years earlier: purge the 100-to-1 ratio from the Sentencing Guidelines in a manner that “achieve[d] consistency with other guideline provisions and applicable law.” 124 Stat. 2374.⁹

⁹ Failing to apply the FSA to all post-Act sentencing would produce another anomaly. Section 10 of the Act directs the Sentencing Commission, “[n]ot later than 5 years after the date of enactment of this Act,” to “study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.” 124 Stat. 2375. But the offenders most likely to face sentencing in early years after the Act will be pre-enactment offenders, given the five-year limitations period for federal drug offenses and the time required to prosecute. See pp. 29-30 & n.7, *supra*. Thus, if the FSA’s revised statutory penalties were inapplicable to pre-enactment offenders, then “during the time period in which the Sentencing Commission is supposed to produce a report on the effects

3. Congress understood that the Commission could not effectively “achieve[] consistency” with “applicable law” if the pre-FSA mandatory minimums remained in effect

Congress’s instruction to the Commission in Section 8 to “achieve consistency” in implementing the FSA underscores the necessary inference that Congress intended all of the FSA’s reforms, including the statutory amendments, to have immediate effect. As Congress well understood, the Commission could not meaningfully “achieve consistency” with “applicable law,” § 8, 124 Stat. 2374, if the pre-FSA mandatory minimums remained “applicable” to pre-enactment offenders.

As Congress knew, the Commission has characteristically incorporated mandatory minimum penalties into the Sentencing Guidelines in a manner that ensures the consistency and proportionality of the sentences imposed for all drug quantities. Since the first version of the Guidelines, it has done so by using the threshold quantities for the mandatory minimum penalties imposed by Congress as “reference points” (1995 Report 126) and then “extrapolating upward and downward to set guideline sentencing ranges for all drug quantities” (2007 Report 3). See generally U.S. Sentencing

of the FSA, the Act often [would] be inapplicable.” *Dixon*, 648 F.3d at 202; see *ibid.* (suggesting that the required report “would be incomplete, at best, and incomprehensible, at worst” (citation omitted)); accord *Holcomb*, 657 F.3d at 457 (Williams, J., dissenting from denial of rehearing en banc). Congress’s direction to the Commission to study “the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act” in the first “5 years after the date of enactment of this Act” naturally implies that Congress expected the FSA to have an “impact” immediately.

Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 53-55 (Oct. 2011) (2011 Mandatory Minimums Report). The Commission has employed this technique not only for crack and powder cocaine offenses, see 2007 Report 3; *Kimbrough*, 552 U.S. at 96-97, but for other mandatory minimum penalties in the federal drug laws as well, see, e.g., 2011 Mandatory Minimums Report 53-54; 2007 Report 5. By incorporating statutory penalties into the Guidelines in this way, the Commission is able to establish a rational and consistent penalty scheme that, from the foundation established by Congress, assigns base offense levels to drug offenders in proportion to the quantity of drugs for which they are found responsible. See 2011 Mandatory Minimums Report 349 n.845 (explaining that "incorporating the mandatory minimum penalties in this manner" serves the purpose, *inter alia*, of ensuring "graduated, proportional increases based on drug quantity for the full range of possible drug types and quantities").

When Congress directed the Commission in Section 8 of the FSA to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law," 124 Stat. 2374, it signaled its intention for the Commission to incorporate the FSA's 18-to-1 ratio into the Guidelines in a similarly rational and proportional manner. And that is in fact how the Commission understood Section 8. In promulgating its emergency Guidelines amendments, the Commission explained that it would "account for the[] statutory changes" made by the FSA by "conform[ing] the guideline penalty structure for crack cocaine offenses to the approach followed for other

drugs”—i.e., by using the FSA’s revised statutory trigger quantities for the five- and ten-year mandatory minimum penalties (28 grams and 280 grams, respectively) as reference points and extrapolating upward and downward. 75 Fed. Reg. at 66,191 (App. *infra*, 44a-46a). The Commission explained: “[T]his approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.” *Ibid.*

But as Congress would have recognized, a “consisten[t] and proportional[]” scheme of this kind would be impossible for the Commission to achieve immediately if the pre-FSA mandatory minimums remained “applicable.” Indeed, a Guidelines regime predicated on an 18-to-1 drug quantity ratio would be irreconcilably *inconsistent* with statutory minimum penalties based on a ratio more than five times as severe. The table below illustrates some of the gross incongruities that would result from sentencing pre-enactment offenders under the post-FSA Guidelines, see 18 U.S.C. 3553(a)(4), but also imposing the pre-FSA mandatory minimum penalties. See generally *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting from the denial of rehearing en banc) (providing similar examples). For example, an offender who possessed with the intent to distribute five grams of crack cocaine would face an advisory Guidelines sentence of 24 to 30 months of imprisonment under the post-FSA Guidelines amendments, assuming a criminal history category of II and no other aggravating or mitigating factors. See Guidelines § 2D1.1(c) (2011); *id.* Ch. 5, Pt. A (sentencing table). Under 21 U.S.C. 841(b)(1)(B) (2006), however, the district court would be

required to impose a minimum sentence of 60 months—a sentence *two and one-half times* the minimum suggested by the Guidelines. And if the offender had a previous felony drug conviction, his post-FSA Guidelines range would still be 24 to 30 months, but his mandatory minimum penalty under pre-FSA law would be 120 months—up to *five times* the appropriate sentence indicated by the Guidelines.¹⁰

In light of Congress's directive to the Commission to make "conforming amendments * * * to achieve consistency" with "applicable law" in adopting new Guidelines that Congress knew would be immediately applicable to *all* offenders, 18 U.S.C. 3553(a)(4)(A)(ii),

¹⁰ These incongruities would be even worse for offenders with no criminal history, for whom the applicable Guidelines ranges are even lower. See Sentencing Guidelines Ch. 5, Pt. A (sentencing table). Under the "safety valve" provision in 18 U.S.C. 3553(f), however, drug-trafficking offenders who have little or no criminal history and who satisfy the other requirements of that provision—including "truthfully provid[ing] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," 18 U.S.C. 3553(f)(5)—may be sentenced without regard to a statutory minimum penalty. See also Guidelines § 5C1.2. Offenders with a criminal history category of II or higher (i.e., those with at least 2 criminal history points), however, are ineligible for relief under the safety valve. Relatively few crack offenders are eligible for safety-valve relief because most are disqualified by their criminal histories. See 2011 Mandatory Minimums Report 195 (only 11.7% of crack cocaine offenders received safety-valve relief in fiscal year 2010).

| Crack Cocaine Quantity (grams) | Criminal History Category | Post-FSA Guidelines Sentence (months) | Pre-FSA Mandatory Minimum (months) | Increase Over FSA Minimum Sentence |
|--------------------------------|---------------------------|---------------------------------------|------------------------------------|------------------------------------|
| 5.0 | II | 24-30 | 60 | 150% |
| 5.6 | II | 30-37 | 60 | 100% |
| 11.2 | II | 37-46 | 60 | 62% |
| 50.0 | II | 70-87 | 120 | 71% |
| 112.0 | II | 87-108 | 120 | 38% |
| 5.0 1 prior drug felony | II | 24-30 | 120 | 400% |
| 5.0 2 prior drug felonies | III | 27-33 | 120 | 344% |

Post-FSA Guidelines sentences and pre-FSA mandatory minimum penalties for selected crack cocaine quantities.

such results are contrary to Congress's manifest intent. The impossibility of a "consisten[t]" penalty scheme under the court of appeals' interpretation of the FSA is underscored by the fact that, for a wide variety of common drug quantities, the *entire Guidelines range* under the Commission's post-FSA Guidelines would be

overridden by the pre-FSA mandatory minimum penalties.¹¹

Mandatory minimum statutes play a critical role in crack cocaine sentencing. As this Court noted in *Kimbrough*, “[t]he Sentencing Commission reports that roughly 70 percent of crack offenders are responsible for drug quantities that yield base offense levels [under the pre-FSA Guidelines] at or only two levels above those that correspond to the statutory minimums.” 552 U.S. at 108 n.15 (citing 2007 Report 25). And under pre-FSA law, most crack offenders remained subject to mandatory minimums at sentencing. See 2011 Mandatory Minimums Report 195 (in fiscal year 2010, 64% remained subject). For many of those defendants, the post-FSA Guidelines would be entirely irrelevant if the 100-to-1 statutory minimums remained applicable. Even offenders who qualified for sentences below the mandatory minimum under 18 U.S.C. 3353(e) by virtue of substantial assistance to the prosecution would not be assisted by the post-FSA Guidelines. Cf. 2011 Manda-

¹¹ For example, under the FSA’s 18-to-1 ratio, an offender with a criminal history category of II who was convicted of trafficking in 10 grams of crack cocaine would have a base offense level of 18 and an advisory Guidelines sentence of 30 to 37 months. See Guidelines § 2D1.1(c) (2011). But under pre-FSA law, the same offender would face a mandatory minimum penalty of 60 months, displacing his post-FSA Guidelines range entirely. See 21 U.S.C. 841(b)(1)(B) (2006). Even if that offender received a two- or even four-level enhancement for specific offense characteristics—for example, for possessing a firearm (Guidelines § 2D1.1(b)(1)) or maintaining a premises for distributing drugs (*id.* § 2D1.1(b)(12))—the applicable post-FSA Guidelines range would still be completely overridden by the pre-FSA mandatory penalty. A four-level increase would yield a base offense level of 22 and an advisory Guidelines range of 46 to 57 months, still less than the 60-month mandatory minimum penalty.

tory Minimums Report 196 (approximately 25% of crack offenders received substantial-assistance relief from statutory minimum penalties in fiscal year 2010). Substantial-assistance departures must be based solely on the level of the cooperation provided, not on an otherwise-applicable Guidelines range or *Booker* factors. See, e.g., *United States v. Winebarger*, No. 11-1905, 2011 WL 6445136, at *7 (3d Cir. Dec. 23, 2011).

The post-FSA ranges that would be submerged below the pre-FSA mandatory minimum statutes encompass some of the most common crack cocaine quantities prosecuted in the federal courts. In fiscal year 2006, for example, the median drug weight for all crack cocaine offenders in the federal courts was 51.0 grams, and more than one-third of all offenders had less than 25 grams. See 2007 Report Tbl. 5-2, at 108, Tbl. 5-3, at 112. Given the significant influence of mandatory minimum statutes, as Judge Boudin observed, “[i]t seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums.” *United States v. Douglas*, 644 F.3d 39, 444 (1st Cir. 2011); see also *Holcomb*, 657 F.3d at 457 (Williams, J. dissenting from the denial of rehearing en banc) (“Using a pre-FSA 100:1 minimum coupled with an 18:1 guideline to decide a sentence does not ‘achieve consistency.’ It achieves the opposite.”); *United States v. Dixon*, 648 F.3d 195, 201 (3d Cir. 2011) (“Refusing to apply the mandatory minimums in the FSA eviscerates the very consistency and conformity that the statute requires.”).

It is implausible that Congress directed the Commission to act “as soon as practicable” to issue

amended crack cocaine Guidelines that would be wholly inapplicable to a substantial percentage of the crack cocaine offenders likely to face sentencing in the immediate wake of the FSA. Congress enacted the FSA against the backdrop of this Court's ruling in *Gall*, which recognized that "the Guidelines should be the starting point and the initial benchmark" for all sentencing decisions. 552 U.S. at 49. Congress could not have meant that district courts sentencing pre-enactment offenders must often start with a benchmark that would serve no purpose.

B. The History And Purposes Of The FSA Confirm That Congress Did Not Intend District Courts To Continue To Impose Mandatory Minimum Sentences Under A 100-to-1 Ratio

Congress's overriding aim in enacting the FSA was to correct a disproportionate and unjustified punishment regime that created racial disparities in sentencing and that had "foster[ed] disrespect for and lack of confidence in the criminal justice system." 2002 Report 103. In abolishing the 100-to-1 ratio, Congress commanded the Commission to act "as soon as practicable" to conform its Guidelines to the new mandatory minimum statutes, which embodied an 18-to-1 ratio. The history and purpose of the FSA remove any doubt that Congress sought to eradicate the 100-to-1 ratio from federal sentencing practice from the date of the Act forward.

1. The history of the FSA corroborates Congress's intent

Introduced in October 2009 as S. 1789 and reported out of the Senate Judiciary Committee by unanimous vote, the FSA passed the full Senate by unanimous consent and the House of Representatives by voice vote.

See 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin); *id.* at S1683; 156 Cong. Rec. H6204 (daily ed. July 28, 2010). Although no committee report accompanied the bill, the legislative history corroborates the clear implication of Section 8 of the FSA in at least two respects.

First, in drafting the FSA, Congress considered and rejected statutory language that would have expressly limited the application of the Act to offenses committed after the Act's effective date. The Senate bill that ultimately became the FSA, S. 1789, was based on an earlier measure, H.R. 265, 111th Cong. (2009) (H.R. 265), that had been introduced in the House in January 2009. Much of the original text of S. 1789 was drawn nearly verbatim from H.R. 265, including the provisions amending the crack/powder disparity, repealing the mandatory minimum penalty for simple possession of crack cocaine, and providing for various sentencing enhancements. Compare H.R. 265, §§ 3-5, 8-9 (as introduced Jan. 7, 2009), with S. 1789, 111th Cong. §§ 2-8 (as introduced Oct. 15, 2009); see also 156 Cong. Rec. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) (describing H.R. 265 as "the underpinnings" of the FSA).¹² H.R. 265 further provided in its eighth section for a grant of "emergency authority" to the Sentencing Commission in language that closely parallels Section 8 of the FSA.

But H.R. 265 differed in two significant respects from the statute that Congress ultimately enacted. First, H.R. 265 provided, in a separate section entitled "Effective Date," that "[t]he amendments made by this

¹² H.R. 265 would also have provided new federal grant programs to encourage drug treatment programs for prisoners. See H.R. 265, §§ 6-7. These provisions were not carried forward in S. 1789.

Act shall apply to any offense committed on or after 180 days after the date of enactment of this Act. There shall be no retroactive application of any portion of this Act." H.R. 265, § 11. The FSA contains no analogous provision. Second, while H.R. 265 would have provided emergency amendment authority to the Commission, it would have done so on a permissive rather than mandatory basis: the bill provided that the "Sentencing Commission, *in its discretion, may*" promulgate emergency amendments implementing "the directives in this Act." H.R. 265, § 8(a) (emphasis added). That permissive formulation was carried forward into the original version of S. 1789 introduced in the Senate. But Section 8 emerged from the legislative process as a mandatory directive to the Commission to implement the FSA's reforms "as soon as practicable." FSA § 8, 124 Stat. 2374.

Congress thus specifically considered and *deleted* language that would have confined the Act's effect to post-enactment conduct, implying that no such limitation was intended. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). And Congress underscored that it regarded implementation of the FSA's reforms as a priority by rejecting language that would merely have permitted, but not required, the Commission to act immediately.¹³

¹³ Although the Court declined to draw any inference from the permissive rather than mandatory authority granted to the Attorney General in *Reynolds v. United States*, No. 10-6549 (Jan. 23, 2012), slip op. 12, in the context of the FSA, the deliberate change from a permissive approach to a mandatory directive in the drafting history of

Second, the legislative history of the FSA makes clear that Congress was intensely concerned with the racially disparate impact of the crack/powder disparity. The Sentencing Commission reported in 2002 that “[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000.” 2002 Report 102; see also 2007 Report 15 (approximately 82% of crack cocaine offenders in 2006 were black). Consequently, to the extent that the 100-to-1 ratio “result[ed] in unduly severe penalties for most crack cocaine offenders, the effects of that severity [e]ll primarily upon black offenders.” 2002 Report 103.

The unintended racial impact of the 100-to-1 ratio greatly disconcerted members of Congress. See, e.g., 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) (“[T]he crack/powder disparity disproportionately affects African Americans.”); *id.* at S10,492 (statement of Sen. Leahy) (“[T]his policy has had a significantly disparate impact on racial and ethnic minorities. * * * These statistics are startling. It is no wonder this policy has sparked a nationwide debate about race bias and undermined citizens’ confidence in the justice system.”); *id.* at S10,493 (statement of Sen. Specter) (“I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does.”); 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn) (reducing the crack/powder disparity “will do more than any other policy change to close the gap in incarceration rates between African Americans and white Americans”); *id.* at H6202 (statement of Rep.

Section 8 underscores Congress’s intent that the amended Guidelines not lag behind the FSA’s statutory amendments. See pp. 27-35, *supra*.

Lungren) (“When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don’t think we can simply close our eyes.”). Congress cannot have intended to continue to impose statutory penalties based on a 100-to-1 ratio and thus perpetuate those racial disparities.

2. *The purpose of the FSA reinforces Congress’s intent*

The court of appeals’ interpretation of the FSA is also irreconcilable with the manifest purpose of the Act. Congress named the statute the “Fair Sentencing Act of 2010.” § 1, 124 Stat. 2372. It explicitly stated that the purpose of the Act was to “restore fairness to Federal cocaine sentencing.” Pmbl., 124 Stat. 2372. It enacted the statute in response to “almost universal criticism” (2007 Report 2) of the 100-to-1 disparity as disproportionately severe, unwarranted by any legitimate public policy, and racially disparate in impact. And the Sentencing Commission—the expert body that Congress had specifically created for the purpose, *inter alia*, of advising it on the need for statutory changes in sentencing law, see 28 U.S.C. 994(r)—had described the need to abolish the 100-to-1 ratio as both “urgent and compelling.” 2007 Report 9.

Against that background, “what possible reason” could Congress have had “to want judges to *continue* to impose new sentences that are not ‘fair’ over the next five years while the statute of limitations runs?” *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), aff’d, 644 F.3d 39 (1st Cir. 2011). None exists. Congress’s judgment, based on the unanimous findings of the Sentencing Commission reiterated over more than 15 years, was that the statutory penalties reflecting the

100-to-1 ratio (as well as the mandatory minimum sentence for the simple possession of crack cocaine) were themselves a source of substantial unfairness in federal law. Prolonging the inequities of that scheme would serve no rational legislative purpose. Even the court of appeals could not identify any reason why Congress would have wanted offenders like petitioners to be sentenced “under a structure which has now been recognized as unfair” based only on a “temporal roll of the cosmic dice.” Dorsey Pet. App. A4; see also *Holcomb*, 657 F.3d at 450 (Easterbrook, C.J.) (seeing “no satisfactory answer” to why Congress would have wanted pre-enactment offenders to remain subject to the prior mandatory minimums).

Chief Judge Easterbrook thought it equally arbitrary to conclude that August 3, 2010, the date of the FSA’s enactment, was the effective date: “[W]hat’s fair about condemning someone sentenced on August 2 to more time in prison than a person sentenced the next day, even though they committed their crimes on the same date?” *Holcomb*, 657 F.3d at 451-452. But ordinary rules of finality counsel against the disruption caused by upsetting sentences already imposed and requiring full-scale resentencing. In many cases, the government may have declined to bring or agreed to drop other charges in reliance on the stringent mandatory minimum sentences for crack offenders. Reopening those sentences without permitting the government to revive other charges could create serious injustices, particularly if the statute of limitations or loss of evidence frustrated any such effort. Additionally, requiring full-scale resentencing under the FSA for previously sentenced defendants would impose substantial burdens on the administration of justice. Congress therefore

had sound reason for leaving past sentencing undisturbed. But those concerns do not suggest that it intended to countenance the infliction of new unfairness in the future. See *Douglas*, 644 F.3d at 43-44 (noting that “the FSA’s legislative history indicates Congress’[s] concern about any proposal that would require courts to resentence the vast number of prisoners in federal custody serving sentences for pre-FSA cocaine base offenses,” but also observing that “new sentences being imposed today for pre-FSA cocaine base offenses are a far smaller category and present no such administrative burden”).

Moreover, applying an ameliorative change to defendants sentenced after the new rule is issued, while withholding the new rule from defendants already sentenced, is the ordinary practice under the Sentencing Reform Act. The sentencing court applies the Guidelines and policy statements in effect on the date of sentencing, regardless of the date of the underlying conduct. See 18 U.S.C. 3553(a)(4)(A)(ii) and (5)(B). But the court cannot ordinarily modify a sentence of imprisonment already imposed.¹⁴ 18 U.S.C. 3582(c).

¹⁴ Congress has authorized the Commission to make retroactively effective Guidelines amendments that reduce the recommended term of imprisonment. See 28 U.S.C. 994(u). But Congress has not required the Commission to do so. Thus, by instructing the Commission to issue emergency Guidelines implementing the FSA, Congress left to the Commission’s discretion whether to make the amended Guidelines retroactive. In July 2011, the Commission voted to take that step, emphasizing that its decision would “not make any of the statutory changes in the [FSA] retroactive.” See 76 Fed. Reg. 41,333 (July 13, 2011). Although that decision rendered many previously imposed sentences eligible for modification, see 18 U.S.C. 3582(c)(2), such proceedings are not full-fledged resentencings and consequently entail far fewer burdens on the criminal justice system. See *Dillon v. United*

Thus, defendants not yet sentenced may often benefit from new, more lenient Guidelines provisions while defendants who committed their crimes on the same dates, but who were charged or pleaded guilty earlier, may not. The “partial retroactivity” that Chief Judge Easterbrook regarded as incompatible with 1 U.S.C. 109, see 657 F.3d at 448, is in fact the general rule in federal sentencing law. And Congress adhered to that general rule in enacting the FSA.

C. The Court Of Appeals' Reliance On The General Saving Statute Was Misplaced

The court of appeals concluded that the general saving statute, 1 U.S.C. 109, foreclosed petitioners' requests to be sentenced under the FSA. See Dorsey Pet. App. A3-A4; Hill Pet. App. A2; see also *Holcomb*, 657 F.3d at 446-447 (Easterbrook, C.J.). Although the court of appeals was correct that the FSA is the sort of ameliorative criminal legislation that may trigger the default rule established by Section 109, that rule has no proper application here. Congress clearly expressed its intent that the FSA's revised statutory penalties should apply in all initial sentencing proceedings after the effective date of the Act, see pp. 27-43, *supra*, and it was the prerogative of Congress in 2010 “to make its will known in whatever fashion it deem[ed] appropriate.” *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring). Because Congress expressed no such intent with regard to offenders who had already

States, 130 S. Ct. 2683, 2691 (2010) (Section 3582(c)(2) authorizes “only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding”); see also 76 Fed. Reg. at 41,334 (observing that Section 3582(c)(2) motions are “routinely” decided “on the filings, without the need for a hearing or the presence of the defendant”).

been sentenced under prior law, however, Section 109 preserves the final judgments imposed in such cases, consistent with the framework established by Congress in the Sentencing Reform Act.

1. Section 109 provides a default rule that is overcome by a clear contrary legislative intent

At common law, the repeal or amendment of a criminal statute—including an amendment that reduced the applicable penalties—abated all prosecutions under the repealed statute that had not yet become final on appeal. *Marrero*, 417 U.S. at 660; *Bradley v. United States*, 410 U.S. 605, 607-608 (1973); see, e.g., *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871) (replacement of 1813 criminal statute by a broader criminal statute with different penalties abated pending prosecution). To avoid inadvertent abatements under that doctrine, Congress in 1871 enacted the general federal saving statute, which in its current form provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. 109; see Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 432; *Marrero*, 417 U.S. at 660.

Section 109 thus presumptively reverses the common law rule: federal criminal liability incurred when a person commits an offense is presumed *not* to be released or extinguished by the modification or repeal

of the law proscribing his conduct or providing the penalty. See *Marrero*, 417 U.S. at 659-664 (Section 109 preserved a prohibition against parole under repealed statute); *United States v. Reisinger*, 128 U.S. 398, 403 (1888) (“[The] word ‘liability’ [in the saving statute] is intended to cover every form of punishment to which a man subjects himself, by violating the common laws of the country.” (quoting *United States v. Ulrici*, 28 F. Cas. 328, 329 (C.C.E.D. Mo. 1875) (No. 16,594) (Miller, Circuit Justice)).

But Section 109 establishes only a default rule. Because “one legislature cannot abridge the powers of a succeeding legislature,” *Fletcher*, 10 U.S. (6 Cranch) at 135, this Court has recognized “that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute.” *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring). “When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other ‘magical password.’” *Id.* at 149. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (concluding that the Immigration and Nationality Act exempted deportation hearings from the procedural requirements of the APA, notwithstanding the APA’s express-reference requirement).

For this reason, notwithstanding that Section 109 on its face preserves liability for acts done under repealed statutes unless the repealing act “expressly provide[s]” otherwise, this Court has explained that Section 109 has no effect if a subsequent Act of Congress clearly expresses—in any sufficient fashion—a contrary intent. See, e.g., *Great N. Ry.*, 208 U.S. at 465 (Section 109

"cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment."); *id.* at 466 ("by fair implication"); *Hertz v. Woodman*, 218 U.S. 205, 218 (1910) ("by clear implication"); *Marrero*, 417 U.S. at 659 n.10 ("by fair implication").

2. *Congress clearly expressed its intent that the FSA's revised penalties should apply immediately in post-enactment sentencing.*

Section 109 therefore does not prevent a sentencing court from applying the FSA's revised statutory penalties to pre-enactment offenders, such as petitioners, who had not yet been sentenced on the date of enactment. As explained, pp. 27-43, *supra*, Congress clearly expressed its intent that its repeal of the 100-to-1 ratio should be immediately effective. Section 8's emergency directive to the Sentencing Commission is incompatible with the court of appeals' conclusion that Congress intended district courts to continue to impose mandatory minimum sentences under pre-FSA law for years into the future. It was Congress's prerogative in enacting the Fair Sentencing Act to "to make its will known in whatever fashion it deem[ed] appropriate." *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring). That intent controls under Section 109 and was binding on the courts below.

At the same time, Section 109 requires the conclusion that pre-enactment offenders on whom a sentence had *already* been imposed at the time of the FSA's enactment remain ineligible for relief from the mandatory statutory penalties imposed under prior law. See *Marrero*, 417 U.S. at 659-664 (Section 109 barred habeas corpus relief for an offender convicted and

sentenced under a prior scheme). Nothing in the FSA expresses a clear congressional intent with regard to such offenders: by directing the Commission to issue “as soon as practicable” Guidelines amendments that would apply in all initial sentencing proceedings, 18 U.S.C. 3553(a)(4), Congress addressed itself to future sentencing determinations, not to determinations already made and embodied in final judgments. Consequently, as every court of appeals to address the question has held, see *United States v. Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (per curiam) (collecting cases), Section 109 bars offenders who were both convicted and sentenced before the enactment of the FSA from obtaining relief under the Act, except to the limited extent that Congress has otherwise provided for retroactive sentence adjustments under the Sentencing Reform Act. 1 U.S.C. 109; see 18 U.S.C. 3582(c).¹⁵

Congress thus adhered in the Fair Sentencing Act to the basic framework for federal sentencing determinations established decades earlier in the Sentencing Reform Act. As already discussed, see pp. 49-50, *supra*, that Act contemplates that a sentencing court cannot ordinarily modify a sentence of imprisonment already imposed. 18 U.S.C. 3582(c). But it also contemplates a system of ongoing refinement in which sentencing courts must consider the suitable penalty for an offense as reflected in the most recent Guidelines and policy statements promulgated by the Sentencing Commission. 18 U.S.C. 3553(a)(4) and (5); see, e.g., 28 U.S.C. 991(b)(1)(C) (directing that the Guidelines and policy statements shall “reflect, to the extent practicable,

¹⁵ As previously noted, see note 14, *supra*, the Sentencing Commission in July 2011 exercised its discretion under 28 U.S.C. 994(u) to make its post-FSA Guidelines amendments retroactively effective.

advancement in knowledge of human behavior as it relates to the criminal justice process"); 28 U.S.C. 994(f); 28 U.S.C. 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the [Guidelines]."). Thus, the Senate committee report accompanying the Sentencing Reform Act explained that Section 3553(a)(4) reflected the "philosophy embodied in" the Act that the operative version of the Guidelines should always reflect the "most sophisticated" understanding of the penalties that "will most appropriately carry out the purposes of sentencing." S. Rep. No. 223, 98th Cong., 1st Sess. 74 (1983); see also *ibid.* ("To impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.").

Consistent with that longstanding approach to federal sentencing law, Congress did not seek in the Fair Sentencing Act to disturb mandatory minimum sentences imposed before the FSA's enactment. But it *did* intend that crack cocaine offenders such as petitioners who had not yet been sentenced when the FSA became effective would receive a sentence according to the FSA's terms, which reflect Congress's best judgment regarding the penalty appropriate for their crimes.

CONCLUSION

The judgments of the court of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

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JANUARY 2012

APPENDIX A

[SEAL OMITTED]

*Office of the Attorney General
Washington, D.C. 20530*

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr. ERIC J. HOLDER, JR.
Attorney General

SUBJECT: Application of the Statutory Mandatory
Minimum Sentencing Laws for Crack Co-
caine Offenses Amended by the Fair Sen-
tencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most de-

(1a)

structive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus. Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencing conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed*, *United States v. Douglas*, No. 10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In light of the differing court decisions—and the serious impact on the criminal justice system of continuing

to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to “restore fairness in federal cocaine sentencing policy” but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act’s new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its long-standing authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the Act’s central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the federal sentencing guidelines

implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme—defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencing that take place after the bill was signed into law. That is what I direct you to undertake today.

APPENDIX B

1. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 provides:

An Act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Fair Sentencing Act of 2010”.

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking “50 grams” and inserting “280 grams”; and

(2) in subparagraph (B)(iii), by striking “5 grams” and inserting “28 grams”.

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking “50 grams” and inserting “280 grams”; and

(2) in paragraph (2)(C), by striking “5 grams” and inserting “28 grams”.

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) **INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPOSE.—**Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in subparagraph (A), by striking "\$4,000,000", "\$10,000,000", "\$8,000,000", and "\$20,000,000" and inserting "\$10,000,000", "\$50,000,000", "\$20,000,000", and "\$75,000,000", respectively; and

(2) in subparagraph (B), by striking "\$2,000,000", "\$5,000,000", "\$4,000,000", and "\$10,000,000" and inserting "\$5,000,000", "\$25,000,000", "\$8,000,000", and "\$50,000,000", respectively.

(b) **INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION.—**Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), by striking "\$4,000,000", "\$10,000,000", "\$8,000,000", and "\$20,000,000" and inserting "\$10,000,000", "\$50,000,000", "\$20,000,000", and "\$75,000,000", respectively; and

(2) in paragraph (2), by striking "\$2,000,000", "\$5,000,000", "\$4,000,000", and "\$10,000,000" and inserting "\$5,000,000", "\$25,000,000", "\$8,000,000", and "\$50,000,000", respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if—

- (1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;
- (2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856); or
- (3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity sub-

ject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant—

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant—

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or

mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that—

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant—

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall—

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) **IN GENERAL.**—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under

part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797–u et seq.).

(b) CONTENTS.—The report submitted under subsection (a) shall—

- (1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;
- (2) address the effect of drug courts on recidivism and substance abuse rates;
- (3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;
- (4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and
- (5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes

in Federal sentencing law under this Act and the amendments made by this Act.

Approved August 3, 2010.

2. 21 U.S.C. 841(a) provides:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

3. 21 U.S.C. 841(b) (2006 & Supp. IV 2010) provides:

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl- N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2- phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in

addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

- (i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;
- (ii) 500 grams or more of a mixture or substance containing a detectable amount of—
 - (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
 - (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
 - (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
 - (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
- (iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

- (iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
- (v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
- (vi) 40 grams or more of a mixture or substance containing a detectable amount of Nphenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] propanamide;
- (vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or
- (viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has

become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in ac-

cordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000

if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance

shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised re-

lease of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's

knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION.—For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

4. 21 U.S.C. 841(b) (2006 & Supp. III 2009) provides:

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2- phenylethyl) -4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than

life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph

graph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$4,000,000 if the

defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results

from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that

authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$100,000 if the defendant is an indi-

vidual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION.—For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation

in or communicate unwillingness to participate in conduct is administered to the individual.

5. 21 U.S.C. 844(a) (Supp. IV 2010) provides:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior con-

viction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

6. 21 U.S.C. 844(a) (2006) provides:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of im-

prisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including

the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

7. 18 U.S.C. 3553(a) provides:

Imposition of a sentence

(a) **FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such pol-

icy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.¹

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

8. Pub. L. No. 104-38, 109 Stat. 334 (1995) provides:

An Act

To disapprove of amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences and sentences for money laundering and transactions in property derived from unlawful activity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

¹ So in original. The period probably should be a semicolon.

SECTION 1. DISAPPROVAL OF AMENDMENTS RELATING TO LOWERING OF CRACK SENTENCES AND SENTENCES FOR MONEY LAUNDERING AND TRANSACTIONS IN PROPERTY DERIVED FROM UNLAWFUL ACTIVITY.

In accordance with section 994(p) of title 28, United States Code, amendments numbered 5 and 18 of the "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary", submitted by the United States Sentencing Commission to Congress on May 1, 1995, are hereby disapproved and shall not take effect.

SEC. 2. REDUCTION OF SENTENCING DISPARITY.

(a) RECOMMENDATIONS.—

(1) IN GENERAL.—The United States Sentencing Commission shall submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and like offenses, including unlawful possession, possession with intent to commit any of the forgoing offenses, and attempt and conspiracy to commit any of the forgoing offenses. The recommendations shall reflect the following considerations—

(A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine;

(B) high-level wholesale cocaine traffickers, organizers, and leaders, of criminal activities should generally receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(C) if the Government establishes that a defendant who traffics in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(D) an enhanced sentence should generally be imposed on a defendant who, in the course of an offense described in this subsection—

- (i) murders or causes serious bodily injury to an individual;
- (ii) uses a dangerous weapon;
- (iii) uses or possesses a firearm;
- (iv) involves a juvenile or a woman who the defendant knows or should know to be pregnant;
- (v) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate his drug trafficking activities;
- (vi) knows, or should know, that he is involving an unusually vulnerable person;

- (vii) restrains a victim;
- (viii) traffics in cocaine within 500 feet of a school;
- (ix) obstructs justice;
- (x) has a significant prior criminal record; or
- (xi) is an organizer or leader of drug trafficking activities involving five or more persons.

(2) RATIO.—The recommendations described in the preceding subsection shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a) of title 28 United States Code.

(b) STUDY.—No later than May 1, 1996, the Department of Justice shall submit to the Judiciary Committees of the Senate and House of Representatives a report on the charging and plea practices of Federal prosecutors with respect to the offense of money laundering. Such study shall include an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute. The Sentencing Commission shall submit to the Judiciary Committees comments on the study prepared by the Department of Justice.

Approved Oct. 30, 1995.

9. 75 Fed. Reg. 66,188 (2010) provides in pertinent part:

UNITED STATES SENTENCING COMMISSION
Sentencing Guidelines for United States Courts

* * * * *

Notice of a temporary, emergency amendment to sentencing guidelines and commentary.

SUMMARY: Pursuant to section 8 of the Fair Sentencing Act of 2010, Public Law 111-220, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

* * * * *

[66,190]

* * * * *

Reason for Amendment: This amendment implements the emergency directive in section 8 of the Fair Sentencing Act of 2010, Public Law 111-220 (the "Act"). The Act reduced the statutory penalties for cocaine base ("crack cocaine") offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives requiring the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases. The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and

to make such conforming changes to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act.

First, the amendment amends the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. See 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, *i.e.*, the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32. See generally § 2D1.1, comment. (backg'd.). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are estab-

lished by extrapolating upward and downward. Con-forming to this approach ensures that the relationship between the statutory penalties for crack cocaine of-fenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.

* * * * *

10. Section 21 of Pub. L. No. 100-182 provided that:

**EMERGENCY GUIDELINES PROMULGATION AU-
THORITY.**

(a) **IN GENERAL.**—In the case of—

(1) an invalidated sentencing guideline;

(2) the creation of a new offense or amendment of an existing offense; or

(3) any other reason relating to the application of a previously established sentencing guideline, and determined by the United States Sentencing Commission to be urgent and compelling;

the Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of title 28 and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System a tem-porary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress under section 994(p) of title 28, United States Code.

(b) **EXPIRATION OF AUTHORITY.**—The authority of the Commission under paragraphs (1) and (2) of subsection (a) shall expire on November 1, 1989. The authority of the Commission to promulgate and distribute guidelines under paragraph (3) of subsection (a) shall expire on May 1, 1988.

10. Sentencing Guidelines 2D1.1(c) (2009) for cocaine base provides:

DRUG QUANTITY TABLE

| Controlled Substances and Quantity* | Base Offense Level |
|---|---------------------------|
| (1) 4.5 KG or more of Cocaine Base | Level 38 |
| (2) At least 1.5 KG but less than 4.5 KG of Cocaine Base | Level 36 |
| (3) At least 500 G but less than 1.5 KG of Cocaine Base | Level 34 |
| (4) At least 150 G but less than 500 G of Cocaine Base | Level 32 |
| (5) At least 50 G but less than 150 G of Cocaine Base | Level 30 |
| (6) At least 35 G but less than 50 G of Cocaine Base | Level 28 |
| (7) At least 20 G but less than 35 G of Cocaine Base | Level 26 |
| (8) At least 5 G but less than 20 G of Cocaine Base | Level 24 |
| (9) At least 4 G but less than 5 G of Cocaine Base | Level 22 |

| | |
|---|----------|
| (10) At least 3 G but less than 7 G of Cocaine Base | Level 20 |
| (11) At least 2 G but less than 3 G of Cocaine Base | Level 18 |
| (12) At least 1 G but less than 2 G of Cocaine Base | Level 16 |
| (13) At least 500 MG but less than 1 G of Cocaine Base | Level 14 |
| (14) Less than 500 MG of Cocaine Base | Level 12 |

* * * * *

***Notes to Drug Quantity Table:**

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * * * *

11. Sentencing Guidelines 2D1.1(c) (Suppl. 2010) for cocaine base provides:

DRUG QUANTITY TABLE

| Controlled Substances and Quantity* | Base Offense Level |
|---|---------------------------|
| (1) 8.4 KG or more of Cocaine Base | Level 38 |
| (2) At least 2.8 KG but less than 8.4 KG of Cocaine Base | Level 36 |

| | | |
|------|---|-----------------|
| (3) | At least 840 G but less than 2.8 KG of Cocaine Base | Level 34 |
| (4) | At least 280 G but less than 840 G of Cocaine Base | Level 32 |
| (5) | At least 196 G but less than 280 G of Cocaine Base | Level 30 |
| (6) | At least 112 G but less than 196 G of Cocaine Base | Level 28 |
| (7) | At least 28 G but less than 112 G of Cocaine Base | Level 26 |
| (8) | At least 22.4 G but less than 28 G of Cocaine Base | Level 24 |
| (9) | At least 16.8 G but less than 22.4 G of Cocaine Base | Level 22 |
| (10) | At least 11.2 G but less than 16.8 G of Cocaine Base | Level 20 |
| (11) | At least 5.6 G but less than 11.2 G of Cocaine Base | Level 18 |
| (12) | At least 2.8 G but less than 5.6 G of Cocaine Base | Level 16 |
| (13) | At least 1.4 G but less than 2.8 G of Cocaine Base | Level 14 |
| (14) | Less than 1.4 G of Cocaine Base | Level 12 |

* * * * *

***Notes to Drug Quantity Table:**

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight

of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * * * *

REPLY BRIEF

In The
Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Mr. Dorsey (joined by the government) urges this Court to vacate the sentence imposed in this case and to remand the case for resentencing under the Fair Sentencing Act because the Act applies to all individuals sentenced after its enactment. Amicus, at this Court's request, has filed a brief ("Amicus Br.") in support of the Seventh Circuit's contrary decision below. 11/29/2011 Order. Amicus relies on the saving statute, 1 U.S.C. § 109, to assert that pre-enactment offenders, like Mr. Dorsey, must be sentenced under an unfair sentencing scheme, even when that unfair scheme was no longer in effect on the date of sentencing.

Citing cases from this Court, as well as dictionary definitions, amicus asserts that a penalty is "incurred" under the saving statute when a criminal offense is committed. Amicus Br. 31-35. This Court's precedents, however, do not support amicus's position. This Court has addressed the meaning of the word "incurred" in the saving statute only once, in *Hertz v. Woodman*, 218 U.S. 205 (1910), and that decision contradicts amicus's position. The other cases cited by amicus have nothing to do with the interpretation of the word "incurred."

The dictionary definitions cited by amicus also do nothing to advance his position. Read correctly, in the past tense, and in light of basic principles of grammar, the definitions confirm that a mandatory minimum penalty is not incurred at the moment an individual commits a crime, but rather when the

penalty is imposed. Amicus's response further ignores Congress's treatment of mandatory minimum penalties in 21 U.S.C. § 841(b) as sentencing factors, rather than elements of the offense. Moreover, if amicus's reading is correct, Congress regularly enacts statutes with surplusage, a conclusion that conflicts with one of this Court's fundamental rules of statutory construction.

Amicus also asserts that Congress's use of the word "amended" in Section 2 of the Fair Sentencing Act is irrelevant because the word "repeal" includes implied repeals. This argument does nothing to overcome the undeniable fact that, as a pure textual matter, the "amended" Fair Sentencing Act falls outside of the "repeal" of a statute referenced in the saving statute. Moreover, the history and purpose of the saving statute confirm that it should not reach ameliorative amendments, and this Court can so hold without overruling any of its precedents.

I. A Mandatory Minimum Penalty Is Not "Incurred" At The Time A Criminal Offense Is Committed.

A. Under this Court's precedent, a mandatory minimum penalty is not "incurred" when a criminal offense is committed.

This Court has only once before addressed the meaning of "incurred" in the saving statute. In *Hertz*, this Court held that a liability was "incurred" "when no other fact or event was essential to [its] *imposition*."

218 U.S. at 220 (emphasis added). In that case, this meant that the inheritance tax at issue was “incurred” at death, rather than at the time the decedent signed the will. Amicus does not dispute that *Hertz* is relevant to the resolution of this case. Instead, amicus asserts that *Hertz* actually supports *his* position because, “[o]nce Petitioners committed each element of an offense subject to the then-applicable mandatory minimum, ‘no other fact or event’ was necessary for a mandatory-minimum sentence under then-existing law.” Amicus Br. 34. Amicus rejects the proposition that “each step in the prosecutorial process” is essential to the imposition of a criminal penalty in light of the second clause of the saving statute. *Id.* at 35.

Amicus’s interpretation of *Hertz* is unpersuasive for two reasons. First, if amicus’s interpretation were correct, liability in *Hertz* would have been incurred when the decedent signed the will, not when he died. The signing of the will is the act that properly compares with the commission of a criminal offense. At that point, the decedent would have understood that the inheritance tax would be incurred upon his death. Under amicus’s logic, because the decedent signed the will while the inheritance tax was in effect, the beneficiaries incurred the tax. Yet, the signing of the will was insufficient in *Hertz* because the decedent’s death was essential to the inheritance tax’s “*imposition*.” 218 U.S. at 220 (emphasis added). Without the decedent’s death, the tax could not be *imposed*, and,

therefore, the liability was incurred only upon the decedent's death.

Similarly, "each step in the prosecutorial process," Amicus Br. 34, is necessary to a criminal penalty's imposition. Just as a decedent must die in order for liability to be "incurred" under an inheritance tax, so too must a criminal defendant be indicted, convicted, and sentenced for a penalty to be "incurred" under a criminal statute. Only then is no other fact or event essential to the criminal penalty's imposition. *Hertz*, 218 U.S. at 220.¹

When one applies these principles to the federal sentencing process, as Congress has defined it, it is clear that a mandatory minimum criminal penalty in federal court is not incurred until sentencing. Dorsey Br. 29-35. Under current prevailing law, drug quantity for mandatory minimum purposes is a *sentencing* factor, found by a judge at *sentrncing* by a preponderance of the evidence submitted at the *sentrncing* hearing. See *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986); see also cases cited at Dorsey Br. 30 n.16. It need not be alleged in the indictment, nor proven at trial beyond a reasonable doubt. And so, amicus is incorrect that "no other fact is necessary," other than the commission of the criminal offense, for the mandatory minimum penalty to apply in this case.

¹ Perhaps recognizing the futility of the endeavor, amicus does not argue that this reading of *Hertz* equates the terms "incur" and "impose." It does not. Dorsey Br. 32-33.

Second, amicus is incorrect that this interpretation of “incurred” would “completely garble the second clause of the [saving] statute.” Amicus Br. 35. Mr. Dorsey’s interpretation is consistent with the second clause’s natural and rightful meaning: the preservation of penalties during the post-sentencing phase of a case. In contrast, amicus’s argument appears to be based on the contrary, and unsound, premise: that the saving statute has no application to cases in post-sentencing stages. As this Court has recognized, however, the saving statute was a response to the common law rule of abatement, and that rule applied to “all prosecutions which had not reached final disposition in the highest court authorized to review them.” *Bradley v. United States*, 410 U.S. 605, 608 (1973). As amicus himself concedes, “[c]riminal prosecutions are not final if direct review or certiorari remain available.” Amicus Br. 48. Moreover, this Court has applied the saving statute to save repealed statutes in cases on collateral review. See, e.g., *Warden v. Marrero*, 417 U.S. 653, 655-56 (1974).

Thus, the second clause of the saving statute operates to save a repealed statute after the penalty has already been incurred – in post-sentencing stages, such as cases pending on appeal or on collateral review – as the lower courts have held with respect to the application of the Fair Sentencing Act to defendants already sentenced at the time of its enactment. See *United States v. Powell*, 652 F.3d 702, 710 (7th Cir. 2011) (collecting cases). Mr. Dorsey’s position is

consistent with that line of cases, and it does nothing to "garble" the second clause of the saving statute.

Indeed, the second clause refers to sustaining a prosecution "for the enforcement of such penalty, forfeiture, or liability." 1 U.S.C. § 109 (emphasis added). Penalties are enforced only after they are imposed. One cannot enforce a penalty before a court imposes it, and hence, before a defendant has incurred it. If the phrase "penalty incurred" is properly interpreted to mean a penalty that has already been imposed, then the second clause means exactly what it says. The old law "shall be treated as still remaining in force for the purpose of sustaining any . . . prosecution for the enforcement" of the penalty already incurred. 1 U.S.C. § 109.²

Amicus also contends that the decisions in *United States v. Reisinger*, 128 U.S. 398 (1888), and *Great Northern Ry. Co. v. United States*, 208 U.S. 452 (1908), confirm that a penalty is incurred when a criminal offense is committed because those cases involved defendants who were not yet indicted for the alleged criminal offenses when the applicable statutes were repealed. Amicus Br. 35. Yet, neither *Reisinger* nor *Great Northern Railway* interpreted the

² For instance, if a defendant was sentenced under an old law but, for whatever reason, was not taken into custody by the Bureau of Prisons until after the law was repealed, the second clause of the saving statute simply means that the government may lawfully take action to enforce the sentence even though the law under which it was incurred no longer exists.

word “incurred” in the saving statute. *Reisinger* dealt exclusively with the terms “penalty, forfeiture, or liability.” 128 U.S. at 402 (noting “the only ground” at issue was whether the statute’s reference to “penalty, forfeiture, or liability” included “crimes, and the punishments therefor.”). The focus in *Great Northern Railway* was the reach of a specific saving clause in the new statute. 208 U.S. at 466-69 (interpreting the “crucial portion of the act, for the purposes of the present inquiry”).

Amicus’s reliance on inferences drawn from the underlying facts, rather than the relevant legal holdings, in *Reisinger* and *Great Northern Railway* assumes too much. It is common practice for this Court to decide only the case before it, and to leave broader issues for another day. “The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.” *NASA v. Nelson*, 131 S.Ct. 746, 756 n.10 (2011) (quoting *Carducci v. Regan*, 714 F.2d 171, 177 (C.A.D.C. 1983) (Scalia, J.); see also *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (noting that this Court “rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present.”). Because there was no issue regarding the meaning of the term “incurred” presented by the parties in *Reisinger* or *Great Northern Ry.*, those cases cannot bear the weight amicus hoists upon them. *Id.*; see also *Henderson ex rel.*

Henderson v. Shinseki, 131 S.Ct. 1197, 1202 (2011) (“[C]ourts are generally limited to addressing the claims and arguments advanced by the parties. Courts do not usually raise claims or arguments on their own.”) (citation omitted).³

Moreover, unlike Mr. Dorsey, the defendants in *Reisinger*, 128 U.S. at 400, and *Great Northern Railway*, 208 U.S. at 466, sought abatement of their prosecutions. In effect, they sought to avoid the imposition of *liability*, rather than the imposition of a prior *penalty*. In contrast, Mr. Dorsey does not seek abatement of his prosecution.⁴ The issue in this appeal, as amicus acknowledges, Amicus Br. 32, is when a *penalty* is incurred, and that is an issue that went unaddressed in *Reisinger* and *Great Northern Railway*. In the end, this Court’s precedent confirms that

³ *Reisinger* and *Great Northern Railway* are good examples of this proposition. Had the parties in those cases focused not only on the word “incurred,” but also on the word “sustaining” in the second clause of the saving statute, the cases arguably would have been decided differently, as the prosecutions had not yet been brought when the statutes at issue were repealed, leaving nothing to be “sustained.”

⁴ Mr. Dorsey could not seek abatement because the Fair Sentencing Act did not amend the substantive provision of the criminal statute at issue in this case, 21 U.S.C. § 841(a). That provision is identical today as it was when Mr. Dorsey committed the underlying criminal conduct. Rather, the Fair Sentencing Act amended only the *penalty* provisions in 21 U.S.C. § 841(b). § 2, 124 Stat. at 2372. Thus, the issue in this case differs entirely from the issues in *Reisinger* and *Great Northern Railway*.

a penalty is not incurred when an offense is committed, and this Court should reject amicus's argument to the contrary.

B. If Congress meant the saving statute to apply to all acts done, or offenses committed, prior to the repeal of a statute, it would have expressly said so in the statute's text.

With respect to the interpretation of the word "incurred," amicus advances only one theory: a penalty is "incurred" at the time an offense is committed. Amicus Br. 33-35. In doing so, however, amicus ignores the fact that such an interpretation would render superfluous the language in a number of statutes enacted around the time of the saving statute. Dorsey Br. 27-28. Amicus provides no explanation for why Congress, in 1870, would pass legislation referring to "an act done, right accrued, or penalty incurred," if a penalty is incurred when an act is done. An Act to reduce Internal Taxes, and for other Purposes, ch. 255, § 17, 16 Stat. 256, 261 (1870); *see also* statutes cited at Dorsey Br. 28 n.14.

Tellingly, amicus offers no response to this point. Nor would a response be consistent with this Court's precedent. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting this Court's "reluctan[ce] to treat statutory terms as surplusage"). The reality is that Congress knew how to refer to an "act done" or "offense committed," yet Congress said no such thing in the

text of the saving statute. Its failure to do so is direct textual evidence that it did not intend for the saving statute's application to turn on the date of the underlying conduct. Because the text of the saving statute does not support amicus's argument, it should be rejected.

C. In plain English, a criminal penalty is not “incurred” when an offense is committed.

Amicus also attempts to support his position with citations to two dictionary definitions, one from 1949, the other from 1785. Of course, the saving statute was passed in 1871, so these dictionary definitions are decades out of date. *See Carcieri v. Salazar*, 555 U.S. 379, 388 (2009) (looking to dictionary definitions at the time of the statute's enactment). The better definitions are those cited in Mr. Dorsey's brief. Dorsey Br. 25.

In any event, the definitions do little to advance amicus's tortured interpretation of “incurred.” The first defines “incur” as to “become liable or subject to.” Amicus Br. 33. The second similarly defines “incur” as “to become liable to a punishment or reprobation.” *Id.* Both definitions, by their inclusion of the verb “become,” confirm that the verb “incur” is not a typical action verb. Mr. Dorsey made this point in his Opening Brief, Dorsey Br. 25-26, 32-33, and amicus has offered no response to it. An individual has not incurred, or become subject to, a liability or a penalty,

or anything else, by an affirmative action; rather, an individual has incurred a liability, a penalty, or anything else when an action is taken upon him, or upon the happening of an event. *See, e.g., Hertz*, 218 U.S. at 220; *United States v. Cliatt*, 338 F.3d 1089, 1091-93 (9th Cir. 2003) (noting that an individual never incurred costs for medical care because she had no obligation to pay for it).

This is why, in *United States v. Follet*, 269 F.3d 996, 1000 (9th Cir. 2001), the Ninth Circuit held, “[a] cost for which the victim will never have to pay because the services will be provided directly by a governmental or charitable organization is not ‘incurred’ by the victim, even if that organization will incur costs for the benefit of the victim.” “Ordinary citizens do not, for example, individually ‘incur costs’ for police or fire services, or for sending their children to their own communities’ public school, even though those services and that education cost a great deal, since the citizens are not obligated to pay the government for its expenditures.” *Id.* Similarly, in this case, the relevant event is the imposition of the penalty. Only when the court imposes the penalty has the defendant incurred it, because only then has the defendant become subject to the penalty. *Id.*

Moreover, amicus forgets that Congress drafted this portion of the saving statute in the *past tense*. In this light, these definitions hardly support amicus’s position. One would not say that a criminal defendant “became liable or subject to” a penalty prior to its imposition. *See Barrett v. United States*, 423 U.S. 212,

216 (1976) (use of the past tense “denote[s] an act that has been completed.”). It would be nonsensical to say that an individual became liable to a penalty if that individual were never prosecuted or if the penalty were never imposed.

Amicus also cites *United States v. Gonclaves*, 642 F.3d 245, 252 (1st Cir. 2011), in support of his position, but, like amicus, that case also relies incorrectly on *Reisinger* for the meaning of the word “incurred.” *Gonclaves* further notes that defining “incurred” with respect to offense conduct “dovetails with ex post facto principles that allow the new statute to apply only to post-enactment conduct.” 642 F.3d at 252. Yet, if the saving statute was meant to “dovetail” with ex post facto principles, then the saving statute has no application in this case, as the Fair Sentencing Act, which *lowered* the applicable mandatory minimum penalty in this case, is not an ex post facto law. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977) (“It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law.”).⁵

⁵ Amicus’s fixation on the Fair Sentencing Act’s increased fines is irrelevant in this case because no fine was imposed. Moreover, the enhancements to the Sentencing Guidelines under the Fair Sentencing Act raise no ex post facto concerns in the Court of Appeals in which this case originated. *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006). In any event, there is nothing that precludes the prospective application of ameliorative amendments, even where other portions of the same statute are inapplicable under ex post facto principles. See, e.g., *Weaver v. Graham*, 450 U.S. 24, 36 n.22 (1981) (noting, “only the *ex post* (Continued on following page)

Amicus's final assertion, made without citation to any authority, is the apparent claim that Congress, rather than a court, imposes penalties, and that a court simply "verifies that the defendant has engaged in criminal wrongdoing and assesses the penalty." Amicus Br. 33-34. As this Court *just* emphasized, however, the task of sentencing traditionally resides in the Judicial Branch. *Setser v. United States*, 566 U.S. ___, 2012 WL 1019970 at *6 (2012) (noting our "tradition of judicial sentencing").

Courts do not mechanically "assess" penalties, they impose them (not Congress). And while the penalties are imposed for violations of the law, and not for "doing a poor job in court," Amicus Br. 34, this does not mean that the penalties are incurred any earlier than their imposition, and certainly not at the time the offense is committed. Indeed, in the federal system, sentencing factors are tied directly to the date of sentencing, and not to the date of the offense conduct, 18 U.S.C. § 3553(a)(4)(A)(ii), and that is true even for facts that trigger a statutory mandatory minimum sentence, *Harris v. United States*, 536 U.S. 545, 568 (2002), a fact amicus ignores.

In the end, as common sense dictates, and as the text of the saving statute confirms, a penalty is not incurred when a criminal offense is committed. If that

facto portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him.").

were the case, there are millions of incurred penalties hanging in space at this moment (as there are surely millions of crimes that have gone undetected), never to be heard of, let alone imposed by a court of law. Yet, when something, *anything*, is “incurred,” it is not done in the abstract; it is a concrete reality.⁶ Because amicus’s interpretation of the saving statute “is sufficiently odd that Congress could not have intended it,” Amicus Br. 47, this Court should reject it.

II. By Its Own Terms, The Saving Statute Applies To Repeals, Not Amendments.

The text of the saving statute is clear: it applies to the “repeal” of a statute. 1 U.S.C. § 109. The text of

⁶ As an example, consider this statement from an opinion just issued by this Court:

The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Lafler v. Cooper, 566 U.S. ___, 2012 WL 932019 at *11 (Mar. 21, 2012) (emphasis added). Clearly, the importance of this sentence is that expenses would be *incurred* only if a new trial were conducted. Under amicus’s interpretation, however, the expenses would be incurred prior to the trial, and arguably as early as the commission of the criminal offense. After all, if penalties are incurred when an offense is committed, one might as well say that expenses related to the enforcement of those penalties are incurred then too. That is surely not the common usage of the word “incurred,” and it is surely not how this Court just used it.

the Fair Sentencing Act is equally clear: it “amended” 21 U.S.C. § 841(b). § 2, 124 Stat. at 2372. Thus, as a textual matter, Congress’s use of the term “amended” in the Fair Sentencing Act is direct evidence of its intent not to save the prior version of § 841(b) via the saving statute. If Congress wanted to invoke the saving statute, it would have “repealed,” not “amended,” § 841(b).

Amicus responds to this argument by criticizing Mr. Dorsey for “never get[ting] around to addressing the statutory text.” Amicus Br. 25. Yet, Mr. Dorsey’s argument begins, and should end, with the statutory text. Dorsey Br. 39-43. It is amicus who strays from the text of the statute by interpreting the word “repeal” to include amendments. Amicus Br. 19-23.

Indeed, as amicus points out, “it is always appropriate to assume that our elected representatives know the law.” Amicus Br. 39 (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) (quotation and alterations omitted)). As such, even if the Fair Sentencing Act’s amendments are considered implied repeals, that does nothing to negate Congress’s use of the term “amended,” rather than “repealed,” in Section 2 of the Fair Sentencing Act. Rather, it proves Mr. Dorsey’s point: Congress could have used the word “repealed”; its failure to do so indicates its intent not to invoke the saving statute to save the prior version of § 841(b). See, e.g., *Hui v. Castaneda*, 130 S.Ct. 1845, 1851 (2010) (recognizing comparison/contrast of different statutes as a valid tool in statutory interpretation). Similarly, Congress could have

referenced “repeal or amendment” in the saving statute, as other statutes passed around 1871 demonstrate that Congress knew how to do so if that was its intent. Dorsey Br. 40-41. Amicus offers no response to this point. As a textual matter, amicus’s position finds no support, whether or not the amendments in this case are considered implied repeals.⁷

III. The Saving Statute Should Have No Application In Cases, Like This One, Involving The Prospective Application Of An Ameliorative Amendment.

A. This Court has never held that the saving statute bars the prospective application of an ameliorative amendment.

Amicus contends that this Court’s decision in *Marrero*, 417 U.S. 653, is dispositive in his favor because *Marrero* held that the saving statute applies to ameliorative amendments. Amicus Br. 23-24. In doing so, amicus ignores the fact that *Marrero* involved a collateral attack on a sentence, and that the defendants in that case were sentenced before the applicable statute was repealed. 417 U.S. at 655-56. In

⁷ Amicus’s citation to the saving statute’s use of the word “any” is also unpersuasive because it modifies “repeal,” and this case does not involve a repeal. Amicus Br. 25. Moreover, as amicus concedes, this Court’s decision in *United States v. Tynen*, 11 Wall. (78 U.S.) 88, 90-91, 95 (1870), was decided after the passage of the saving statute, yet this Court did not mention the saving statute in that case. Amicus Br. 26, 28.

contrast, this case is not a collateral attack – it is a direct appeal. And, Mr. Dorsey was sentenced after the amended statute went into effect. Amicus also ignores the fact that the statute at issue in *Marrero* contained a clause that saved the former statute for all violations committed prior to the statute's repeal. *Id.* at 656. In contrast, the Fair Sentencing Act did not save the former penalty provisions. 124 Stat. 2372.

In other words, while the holding in *Marrero* was correct – the specific clause in the repealed statute saved the statute, and the saving statute arguably did as well because the defendant was sentenced prior to repeal – that holding is not dispositive in this case. To the extent this Court discussed ameliorative amendments, it did so in a different context, and nothing precludes this Court from considering the saving statute's reach to an ameliorative amendment in the present context. This Court can do that without disturbing the holding in *Marrero*.

To be sure, Congress could have amended the saving statute had it thought this Court's decision in *Marrero* misinterpreted it. Amicus Br. 24. Considering that *Marrero* applied the saving statute in light of the specific saving clause in the repealed statute, however, Congress had no reason to respond to the decision in *Marrero*. While it is true that Congress has, on occasion, responded to a decision of this Court, it has done so when this Court reached the wrong conclusion (according to Congress, anyway). See, e.g., William N. Eskridge, Jr., *The Case of the*

Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases, 88 Mich. L. Rev. 2450, 2455-2456 (Apr. 2001); Abner J. Mikva, *When Congress Overrules the Court*, 79 Cal. L. Rev. 729 (May 1991).⁸

Moreover, the fact that the statute at issue in *Marrero* had a specific saving clause undermines amicus's assertion that Congress views the statute as anything more than a general rule of construction. If Congress actually "legislate[s] against the backdrop" of the saving statute, as amicus asserts, Amicus Br. 24, then why would Congress ever include a specific saving clause in a repealing statute? Such clauses would always be superfluous in light of the saving statute. Amicus essentially makes this point himself. Amicus Br. 39-40, 53. Yet, he fails to acknowledge that it is not uncommon for Congress to include specific saving clauses in amending or repealing legislation.⁹

⁸ Amicus's "legislative inertia" argument is also unpersuasive for other reasons. See, e.g., William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613, 670 (May 1991) (noting that "the gatekeepers may favor the decision and, as a consequence, may not introduce or may at least block overruling legislation. The gatekeepers, however, may have preferences different from those of the chamber median; therefore, the failure to act may be attributed to gatekeeper preference rather than the preference of Congress as a whole.").

⁹ Congress currently includes saving clauses to save the effects of amended or repealed statutes. See, e.g., Viral Hepatitis Testing Act of 2011, S. 1809, 112th Cong. § 3(d) (2011); Department of Homeland Security Authorization Act of 2011, S. 1546, (Continued on following page)

Amicus cannot have it both ways: either Congress “legislate[s] against the backdrop” of the saving statute by remaining silent with respect to the reach of an amended or repealed statute, or it views the saving statute as a general rule of construction, and, thus, includes specific saving clauses when it wishes to save former legislation. History supports the latter determination.

Indeed, Congress’s recent inclusion of saving clauses in *amending* statutes is consistent with Mr. Dorsey’s position that the saving statute does not reach amendments, *see supra* n.4 (citing statutes), as is the inclusion of a saving clause in the precursor legislation to the Fair Sentencing Act, H.R. 265, 111th Cong. (2009). Government Br. 44-45. Of course, this saving clause was deleted from the Fair Sentencing Act, not only “implying that no such limitation was intended,” *id.* 45, but *confirming* Congress’s intent not to save the former unfair penalties for crack

112th Cong. § 410(b) (2011); Southeast Hurricanes Small Business Disaster Relief Act of 2011, S. 653, 112th Cong. § 2(b) (2011); NSP Termination Act, H.R. 861, 112th Cong. § 3(b)(1) (2011). It has also used savings clauses in the past to save prosecutions under repealed or amended laws. *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 408(d), 104 Stat. 4978, 5047 (1990) (provisions of law repealed continued in force and effect for all prosecutions, acts, things, liabilities, obligations, or matters existing or done as of the effective date); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 1103(a), 84 Stat. 1236, 1294 (1970) (prosecutions for any violation prior to effective date not affected by repeals or abatements made by the law).

cocaine offenses. Nothing in this Court’s precedent precludes this Court from reaching this correct conclusion, rather than amicus’s “gratuitously silly” one. *United States v. Holcomb*, 657 F.3d 445, 463 (7th Cir. 2011) (Posner, J., dissenting); *see also Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011) (Easterbrook, C.J.) (holding that an inference from silence is “a logical error. Silence is just silence.”).¹⁰

B. Ameliorative amendments did not “universally” abate prosecutions at common law.

According to amicus, abatement “applied universally to any repeal, . . . whether the repeal was ameliorative or otherwise.” Amicus Br. 26. This is incorrect. At common law, both federal and state courts generally followed the principle that, “where a criminal statute is amended, lessening the punishment, a

¹⁰ Equally unavailing is amicus’s suggestion that Congress could have simply deleted the word “no” from H.R. 265, which would have then provided, “[t]here shall be retroactive application of any portion of this Act.” Amicus Br. 53. Putting aside the grammatical problems with this solution, such an alteration would not have accomplished what Congress intended to accomplish with the Fair Sentencing Act – its application to all individuals sentenced after its enactment. The proposed solution would have extended its reach to *all* incarcerated individuals previously sentenced under 21 U.S.C. § 841(b) (not to mention 21 U.S.C. §§ 844 and 960). Yet, no party argues that Congress intended such a result.

defendant is entitled to the benefit of the new act, although the offense was committed prior thereto.” *Moorehead v. Hunter*, 198 F.2d 52, 53 (10th Cir. 1952).¹¹ One such example comes from this Court: *Steamship Co. v. Jollife*, 2 Wall. (69 U.S.) 450, 458-59 (1864). There are others. See, e.g., *Com. v. Wyman*, 66 Mass. 237, 238-39 (1853), and cases cited at Dorsey Br. 51 n.26. Amicus ignores this Court’s decision in *Jollife*, as well as the other cases that applied the common law rule discussed in *Moorehead*. Rather, amicus draws a “universal” rule from six cases. Amicus Br. 25-26. No such “universal” rule existed.

Amicus also focuses on this Court’s use of the phrase “technical abatement.” Amicus Br. 27-30. Citing a footnote in *Marrero*, amicus disagrees that this Court has used the term to reference an increase, rather than a decrease, in penalties, despite this Court’s discussion in *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964) (referring to a “technical abatement” as one that involved “a substitution of a new statute with a greater schedule of penalties”). *Id.* at

¹¹ In a footnote, amicus attempts to discredit this statement from *Moorehead*, noting that the court acknowledged the rule “appl[ied] only where there was no general saving statute.” Amicus Br. 27 n.4. But this does not undermine Mr. Dorsey’s argument. The common law rule at issue preceded the enactment of the saving statute, and so of course it applied in the absence of a general saving statute. Moreover, amicus’s further comments on what the *Moorehead* Court actually meant are pure speculation. *Moorehead* had to do with a “common law principle,” not with legislation. 198 F.2d at 53.

27. Yet, others have understood Hamm's discussion of "technical abatement" to refer to statutes that increase, not decrease, penalties. See, e.g., S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 31-32 (Fall 2009); John P. McKenzie, Comment, *Hamm v. City of Rock Hill and the Federal Saving Statute*, 54 Geo. L.J. 173, 173 n.3 (1965).

In any event, the scope of "technical abatement" is irrelevant in this case, as this case does not involve abatement, whether "technical" or not. Mr. Dorsey does not seek abatement at all. He merely seeks the application of an ameliorative amendment to a penalty provision that was in full force and effect at the time he was sentenced. And so, while this Court has found that abatement was the evil at which the saving statute was aimed to correct, this case has nothing to do with abatement, meaning that it should have nothing to do with the saving statute either. The prospective application of an ameliorative amendment is outside the reach of the saving statute's purpose, just as it is outside the scope of its text. See generally Amicus Br. of National Association of Criminal Defense Lawyers.

IV. The Fair Sentencing Act's Application In This Case Is Not A Retroactive Or "Partially-Retroactive" Exercise.

Finally, amicus assumes, without discussion, that the application of the Fair Sentencing Act in this case

would amount to a retroactive exercise because Mr. Dorsey committed the underlying criminal conduct prior to the Act's enactment. Amicus Br. 11. In doing so, amicus ignores two basic propositions: (1) “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment,” *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 269 (1994); *see also Rep. of Austria v. Altmann*, 541 U.S. 677, 681, 697-98 (2004) (holding that the application of the Foreign Services Intelligence Act to pre-enactment conduct was not a retroactive exercise); and (2) a statute that does not create a “new disability,” like Section 2 of the Fair Sentencing Act, is not a retroactive statute, *Vartelas v. Holder*, __ U.S. __, 2012 WL 1019971 at *6-7 (Mar. 28, 2012).

Indeed, amicus ignores Mr. Dorsey’s entire argument on principles of retroactivity. Dorsey Br. 35-38. In the end, “the relevant retroactivity event is the sentencing date, not the date the offense was committed, because the application of a mandatory minimum is a sentencing factor, not an element of the offense. Accordingly, the application of the FSA is the *prospective* application of current law, not a *retroactive exercise*.” *United States v. Holloman*, 765 F.Supp.2d 1087, 1090-91 (C.D. Ill. 2011) (Mills, J.).

Nor does it make sense to speak in terms of “partial retroactivity.” Amicus Br. 9-10. The relevant retroactivity event is the date of sentencing. Application of the Fair Sentencing Act to all those sentenced after its enactment, while denying application

to those sentenced before its enactment, is neither a “retroactive” nor a “partial” exercise, and, therefore, it is certainly not a “partially retroactive” exercise. There is nothing retroactive about applying an amended penalty provision at a time in which that provision is in full force and effect. Because the Fair Sentencing Act amended § 841(b)’s penalty provisions, any discussion of retroactivity is misplaced because Mr. Dorsey was sentenced after the Act’s enactment.

CONCLUSION

For the foregoing reasons, as well as those stated in the opening briefs of Mr. Dorsey, the government, and Petitioner Hill, the judgment of the court of appeals should be reversed and this case should be remanded for resentencing under the Fair Sentencing Act.

Respectfully submitted,

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REPLY BRIEF

Nos. 11-5683 and 11-5721

In the Supreme Court of the United States

EDWARD DORSEY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 11-5683

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v.

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*ON WRITS OF CERTIORARI
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FOR THE SEVENTH CIRCUIT*

REPLY BRIEF FOR THE UNITED STATES

For nearly 25 years, Congress required federal courts to impose severe mandatory minimum sentences on crack cocaine offenders—mostly racial minorities—based on assumptions about crack cocaine now universally recognized to be unfounded. In the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, Congress acknowledged the error and “restore[d] fairness to Federal cocaine sentencing” by drastically reducing the crack/powder sentencing disparity, repealing the mandatory minimum penalty for the simple possession of crack cocaine, and directing the Sentencing Commission to implement the changes

made by the FSA “as soon as practicable” by issuing “emergency” amendments to the Sentencing Guidelines to “conform[]” the Guidelines to “applicable law.” FSA PmbL & §§ 2-3, 8, 124 Stat. 2372, 2374.

The Court-appointed amicus curiae contends that, notwithstanding the urgency of Congress’s directive to the Sentencing Commission, Congress intended district courts to continue to impose mandatory minimum sentences under pre-FSA law for five more years—in effect, extending the tenure of the discredited 100-to-1 ratio in federal sentencing law by more than one-fifth. In amicus’s view, that result is required by the general saving statute, 1 U.S.C. 109, which, amicus suggests, precludes applying the new law to pre-FSA offenders even when they are sentenced after the FSA has become effective.

Amicus’s invocation of Section 109 is misplaced. That provision must yield to the more recent expression of congressional intent. The FSA gives rise to a “necessary” or “fair implication,” *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); *Warden v. Marrero*, 417 U.S. 653, 659 n.10 (1974), that the new mandatory minimum thresholds provide the “applicable law” in post-FSA sentencing. FSA § 8, 124 Stat. 2374. Amicus characterizes that result as “rank arbitrariness” (Br. 48) because it differentiates defendants based on the date of sentencing. But that is the ordinary rule under the Sentencing Reform Act, which directs federal courts to use the Sentencing Guidelines in effect on the date of sentencing, regardless of the date of the underlying offense. 18 U.S.C. 3553(a)(4)(A)(ii). Every indication of congressional intent supports the conclusion that Congress regarded its new mandatory minimum scheme as the “applicable law” to which the Sentencing Commission was to conform the Guidelines on an emer-

gency basis. That overcomes the default rule under Section 109.

Amicus does not dispute the gross sentencing anomalies that result when mandatory minimum penalties based on a 100-to-1 ratio override Guidelines based on an 18-to-1 ratio. He offers no adequate explanation why Congress would have wanted to perpetuate such a striking disconnect between mandatory minimum penalties and the new Guidelines that it directed the Commission to issue “as soon as practicable.” Nor does amicus suggest any reason why Congress would have extended the severe and racially disparate effects of the 100-to-1 ratio far into the future. The answer is clear: it did not.

A. Amicus Misstates The Inquiry Under Section 109

The government agrees with amicus that the FSA is the sort of ameliorative change in criminal law that triggers an inquiry under the general federal saving statute, 1 U.S.C. 109. See Amicus Br. 19-35. In defending the court of appeals’ application of Section 109 here, however, amicus mistakenly equates the default *interpretive* rule supplied by Section 109 with *substantive* legislation that a later Congress will not be presumed to have displaced unless the later legislation satisfies the stringent standard for finding an implied repeal of a federal statute. See Br. 18 (asserting that, for petitioners to prevail, “the Court *must* find that the FSA amounts to a partial implied repeal” of Section 109).

That is not the correct inquiry. Section 109 does not specify the applicable penalties for crack cocaine offenses, and the Congress that enacted the FSA in 2010 was not required to “repeal” it, impliedly or otherwise, to alter the substantive law governing federal cocaine sentencing. (By contrast, it was necessary for the FSA to repeal the provi-

sions of 21 U.S.C. 841(b) that created the 100-to-1 ratio, and no one doubts that it did so. See FSA § 2, 124 Stat. 2372.) This Court reviews skeptically claims that one federal statute has impliedly repealed another, see, e.g., *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009), because both Congresses—the earlier and the later—had the constitutional authority to enact binding legislation, and federal courts “are not at liberty to pick and choose among congressional enactments” if those enactments are “capable of co-existence.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

“Clear statement” statutes such as Section 109, however, stand on a different footing. Such statutes do not prescribe binding rules of law, but provide background principles that purportedly act on *future* Congresses. As this Court has repeatedly explained, however, “one legislature cannot abridge the powers of a succeeding legislature.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). Because it was the prerogative of the Congress in 2010 to “make its will known in whatever fashion it deem[ed] appropriate,” *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring), amicus errs in suggesting that Section 109 controls unless Congress “repealed” it in the FSA. Rather, Section 109 supplies a default rule of interpretation that is overcome if Congress has expressed a different intention “either expressly or by necessary implication in a subsequent enactment.” *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); see also *id.* at 466 (“by fair implication”); *Warden v. Marrero*, 417 U.S. 653, 660 n.10 (1974) (“by fair implication”); *Hertz v. Woodman*, 218 U.S. 205, 218 (1910) (“by clear implication”).

In urging that Section 109 dictates the conclusion reached by the court of appeals, amicus inaccurately characterizes the issue in these cases as one of “retroactivity.” As an initial matter, no party suggests that the FSA’s sen-

tencing reforms require a federal court to reopen final judgments or modify mandatory minimum terms of imprisonment imposed before the FSA's enactment. Cf. 18 U.S.C. 3582(b) (a judgment of conviction that includes a sentence of imprisonment "constitutes a final judgment"). The FSA applies only to pending cases that have not reached the sentencing phase. See Gov't Br. 53-54. And applying the FSA's reduced drug-quantity thresholds to offenders, such as petitioners, who had *not* yet been sentenced on the date of the FSA's enactment does not involve a "retroactive" application of the Act in any relevant sense. Cf. *Vartelas v. Holder*, No. 10-1211 (Mar. 28, 2012), slip op. 2 (federal statute triggered the presumption against retroactivity because it "attached a new *disability* * * * in respect of past events" (emphasis added)).

That petitioners' criminal conduct occurred before the FSA's enactment does not make the Act "retroactive" in application, any more than application of an ameliorative Guidelines change based on the date of sentencing is "retroactive." A change to the Sentencing Guidelines that reduces the penalty for an offense unquestionably applies immediately in all initial sentencing proceedings, irrespective of the date of the underlying criminal conduct. 18 U.S.C. 3553(a)(4)(A)(ii). But such an amendment becomes "retroactive" only if the Commission separately votes to make it available as a basis for modifying a sentence of imprisonment previously imposed. 28 U.S.C. 994(u); see, e.g., *Dillon v. United States*, 130 S. Ct. 2683, 2688 (2010) (distinguishing between the Commission's "authority to revise the Guidelines" and its power "to determine when and to what extent a revision will be retroactive"). Likewise here, the FSA's effect in sentencing proceedings that had not yet been conducted as of August 3, 2010, is not correctly characterized as a problem of "retroactivity," and presumptions

concerning retroactivity have no role to play. Rather, the issue reduces to one of congressional intent: whether the necessary or fair implication of the FSA is that Congress's reforms of the discredited crack/powder ratio apply in post-FSA sentencing.

B. Congress Intended That The FSA's Statutory Reforms Apply Immediately In All Initial Sentencing Proceedings

1. Amicus acknowledges (Br. 40) that it is “possible” to read the FSA as directing the Sentencing Commission to implement the FSA’s new crack/powder ratio through emergency amendments, *i.e.*, to conform the Guidelines to the FSA as “applicable law.” But amicus suggests that this reading is not “unavoidable” and that it is possible to interpret Section 8 of the FSA as addressed only to the Guidelines amendments contemplated by Sections 5-7 of the Act, which do not concern the crack/powder ratio. Amicus does not posit any reason why Congress would have wanted Sections 5-7, but *not* the Act’s signature change to the crack/powder disparity, to be placed in effect “as soon as practicable.” Even more to the point, amicus does not explain how that construction of Section 8 can be reconciled with the plain terms of that provision, which directs the Commission to “conform[]” the Guidelines to “applicable law.” As amicus does not seriously dispute, the phrase “applicable law” in this context must encompass the FSA, since the version of the Guidelines in effect on August 3, 2010, *already* reflected pre-FSA sentencing law: the only “conforming amendments” necessary were those required to bring the Guidelines in line with the FSA itself. See Gov’t Br. 28.

The extensive efforts in Congress and the Sentencing Commission to address the anomalies created by the 100-to-1 ratio, which amicus fails to address, confirm that Con-

gress intended the Commission to use the emergency authority in Section 8 to conform the Guidelines to the new statutory minimums. See generally Gov't Br. 3-11. The Sentencing Commission had by 2007 described the need to abolish the 100-to-1 ratio as both "urgent and compelling." U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 9 (May 2007) (2007 Report). In urging Congress to do so, the Commission had specifically requested that Congress provide it with emergency amendment authority "to incorporate the statutory changes" into the Guidelines as soon as possible. *Ibid.* Such authority, the Commission emphasized, "would enable the Commission to *minimize the lag between any statutory and guideline modifications* for cocaine offenders." *Ibid.* (emphasis added). Congress responded in Section 8 of the FSA not only by granting the Commission the authority it requested, but by directing it to exercise that authority "as soon as practicable." 124 Stat. 2374.

Amicus contends (Br. 41-43) that Congress required the Commission to act quickly merely out of concern that, absent emergency authority, some *post-enactment* offenders might be sentenced before the Commission could revise the Drug Quantity Table in Sentencing Guidelines § 2D1.1(c). But Congress could rationally assume that relatively few post-enactment offenders would face sentencing in the immediate wake of the FSA. Yet Congress was not content to allow the Commission its usual time for developing new Guidelines. Instead, it (i) revived the Commission's expired authority under Section 21(a) of the Sentencing Act of 1987 to issue emergency Guidelines without awaiting congressional approval; (ii) directed the Commission to issue Guidelines implementing the FSA "as soon as practicable," and (iii) specified that "in any event" the Commission was to promulgate its revised Guidelines "not later than 90 days"

after the FSA's enactment. FSA § 8, 124 Stat. 2374. Those revised Guidelines, as Congress knew, would be immediately effective for *all* offenders, including pre-enactment offenders. 18 U.S.C. 3553(a)(4)(A)(ii). The urgency expressed in Section 8's directive to the Commission therefore strongly reveals Congress's intent that the FSA's reforms govern the sentencing of pre-enactment offenders—the only significant category of offenders likely to face sentencing on the 91st day.

Indeed, Congress expressly contemplated in Section 8 that the Commission might issue its Guidelines *before* 90 days had elapsed ("as soon as practicable")—hardly an implausible scenario, given that the FSA essentially adopted the Commission's own 2002 proposals for cocaine sentencing reform. See *Report to the Congress: Cocaine and Federal Sentencing Policy* 104 (May 2002) (2002 Report); see also 2007 Report 8 & n.26. If the Commission had issued its emergency Guidelines amendments on the first day following the FSA's enactment, those emergency amendments would have affected *only* pre-enactment offenders for weeks or months thereafter.¹ Yet on amicus's view, the Act's signature reform to the statutory penalties—that is, the "applicable law" that warranted the emergency changes in the Drug Quantity Table in the first place—would be

¹ Amicus is therefore mistaken in contending (Br. 43 n.10) that the 90-day deadline imposed by Congress somehow demonstrates that Congress was indifferent about the application of the FSA to pre-enactment offenders. Congress directed to the Commission to act "as soon as practicable." § 8, 124 Stat. 2372. That Congress added a hard 90-day deadline as a back-stop does not suggest indifference to the fate of pre-enactment offenders sentenced in the interim, especially since those offenders could benefit from the district court's authority, recognized in *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009) (per curiam), to vary from crack/powder ratio in the Guidelines. See Gov't Br. 29-30.

inapplicable to such offenders. Amicus thus errs in suggesting (Br. 43-44) that Congress's directive to the Commission in Section 8 has no bearing on whether the Act's revised statutory penalties apply to pre-enactment offenders. See Gov't Br. 31-35.

2. Amicus also discounts (Br. 43) Congress's knowledge that, under 18 U.S.C. 3553(a)(4)(A)(ii), the newly promulgated Guidelines amendments would apply to all initial sentencing proceedings. In amicus's view, this reality has scant relevance because the Guidelines "cannot trump" a statutory penalty. Br. 43 (citing *Neal v. United States*, 516 U.S. 284, 289-290, 295 (1996)). No one suggests that the emergency Guideline amendments required by Section 8 "trump" the pre-FSA mandatory penalties of their own force. Rather, "the question is whether the new statute, by changing the statutory minimum sentences and ordering the Commission forthwith to change its guidelines to comply with the new minimums, 'fairly implies' that the new minimums govern all sentences imposed after the new statute took effect." *United States v. Holcomb*, 657 F.3d 445, 461 (7th Cir. 2011) (Posner, J., dissenting from denial of rehearing en banc). Only one answer makes sense: a Guidelines regime predicated on an 18-to-1 ratio is fundamentally inconsistent with statutory minimum penalties predicated on a ratio more than five times as severe. Congress could not have intended both to apply. As Judge Posner observed, "unless the Act's revised mandatory minimum sentences are also applicable to these defendants, they will receive sentences in excess of the sentencing guidelines that Congress," through its emergency directive to the Sentencing Commission, "intended would apply to such defendants." *Id.* at 462; see also *United States v. Douglas*, 644 F.3d 39, 44 (1st Cir. 2011) (Boudin, J.) (finding that scenario "unrealistic").

Amicus's only response (Br. 43-44) to this statutory dilemma is that the Guidelines would technically conform to the pre-FSA mandatory minimum penalties in such circumstances because, under Sentencing Guidelines § 5G1.1(b), a higher statutory penalty becomes the offender's Guidelines sentence. But if Congress had been content with that solution, much of Section 8 of the FSA would have been for naught: the Commission would have had no need to "conform[]" the Guidelines to "achieve consistency" with the FSA's revised drug-quantity ratio, let alone do so on an emergency basis, because the statutory provisions would automatically control under Section 5G1.1(b). Congress plainly intended for the Commission to "achieve consistency" between the Guidelines and the FSA's reforms in a more meaningful sense. The Commission itself well understood Congress's message. See 75 Fed. Reg. 66,188, 66,191 (Oct. 27, 2010) (explaining that the Commission implemented Congress's instructions in Section 8 by using the FSA's revised statutory trigger quantities for mandatory minimum penalties as reference points and extrapolating upward and downward, thereby ensuring that the FSA's 18-to-1 ratio is "consistently and proportionally reflected throughout the Drug Quantity Table"). Indeed, the Commission has generally not relied on Section 5G1.1(b) to reconcile the Guidelines with statutory minimum penalties in the federal drug laws. See Gov't Br. 36-38.

Apart from citing Section 5G1.1(b), amicus nowhere explains why Congress would have directed the Commission to issue emergency Guidelines amendments applicable in initial sentencing proceedings for *all* offenders "as soon as practicable," yet *also* intended that pre-enactment offenders remain subject to 100-to-1 statutory penalties. Amicus does not dispute the extreme anomalies in sentencing that would result from imposing statutory penalties

based on a 100-to-1 ratio when Guideline ranges are based on an 18-to-1 ratio. The pre-FSA statutory penalties would override the post-FSA Guidelines ranges across a wide spectrum of common drug quantities, in some cases requiring district courts to impose prison sentences as much as *five times longer* than the minimum applicable Guidelines sentence. See generally Gov't Br. 40 (table); see also *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting from denial of rehearing en banc) (providing similar "perverse" examples). Such results cannot reasonably be attributed to congressional intent.²

Congress has previously condemned such anomalies in the specific context of federal cocaine sentencing reform. See Gov't Br. 32-33. In 1995, Congress rejected the Sentencing Commission's original proposal to eliminate the crack/powder disparity from the Guidelines. It did so in part because it concluded that a 1-to-1 ratio was too low. See Act of Oct. 30, 1995, Pub. L. No. 104-38, §§ 1, 2(a)(1)(A), 109 Stat. 334. But it also emphasized the unacceptable sentencing disparities that would result from such a Guidelines revision without simultaneous changes to the statutory minimum penalties. H.R. Rep. No. 272, 104th Cong., 1st Sess.

² Amicus would discount (Br. 44-45) the anomalies created under the court of appeals' interpretation of the FSA on the ground that the safety-valve provisions of 18 U.S.C. 3553(f) will exempt some nonviolent crack offenders with limited criminal histories from the effects of the pre-FSA mandatory minimums. That argument suggests that Congress could not have been concerned with the fate of offenders who failed to qualify for safety-valve relief. But Congress enacted the FSA to reduce the crack/powder disparity for *all* offenders, not just those who qualify for safety-valve relief, because it recognized that the 100-to-1 ratio resulted in disproportionately severe sentences and had a disparate impact on racial minorities, thereby "foster[ing] disrespect for and lack of confidence in the criminal justice system." 2002 Report 103.

4 (1995) (1995 House Report). The House Report emphasized that, regardless of the correct crack/powder ratio, it would make no sense for the Sentencing Commission to adopt a ratio under the Guidelines that was significantly out of proportion with the governing statutory minimum penalties: “[I]f the Commission’s guideline amendments went into effect without Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities.” *Id.* at 4. In particular, the report observed, such a scheme would cause “minor quantity differences” to assume a significance in sentencing vastly disproportionate to any difference in actual culpability. See *id.* at 10. Congress accordingly directed the Commission to propose a “revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes *and* guidelines.” § 2(a)(2), 109 Stat. 335 (emphasis added).

Amicus fails to address this history. Yet the court of appeals’ interpretation of the FSA creates the same “gross sentencing disparities” attributable to “minor quantity differences” that Congress condemned in 1995. For example, a pre-enactment offender who distributed 4.9 grams of crack cocaine (assuming a criminal history category of II and no other aggravating or mitigating factors) would face a minimum advisory Guidelines range of 24 months under the Commission’s post-FSA amendments. But if amicus were correct, an otherwise identical pre-enactment offender who distributed just 0.1 grams more would face a statutory minimum sentence of 60 months—a term of imprisonment two and one-half times longer, equivalent to the post-FSA advisory sentence for an offender who distributes more than 20 grams of crack. Amicus fails to explain why Congress would have intended that the FSA—a statute enacted to “restore fairness to Federal cocaine sentencing,” Pmbl., 124 Stat. 2372—create outcomes so fundamentally

at odds with the Sentencing Reform Act's promise of proportionality in sentencing. See Sentencing Guidelines Ch. 1, Pt. A, Subpart 1.3 (explaining that, in reforming federal sentencing practices, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity"). "Only in comic opera" (Amicus Br. 53) would legislators have such "a pretty taste for paradox."³

Amicus likewise fails to address another peculiar consequence of the court of appeals' interpretation of the FSA: for a wide variety of common drug quantities, the pre-FSA mandatory minimums would override the relevant post-FSA Guidelines ranges in their entirety. See Gov't Br. 40-43 & n.11. That is, for many pre-enactment offenders, the amended Guidelines that Congress directed the Commission to promulgate under the FSA would be completely irrelevant in operation—the pre-FSA statutory penalty would always be higher. It is difficult to understand why Congress would have directed the Commission to act "as soon as practicable" in crafting new Guidelines that would be wholly inapplicable to the largest category of offenders likely to face sentencing in the immediate months following the adoption of those Guidelines. See Gov't Br. 42-43.

3. Amicus contends that the "FSA's most important textual feature" is not Congress's urgent directive to the Commission, but rather "its failure to say a single word" (Br. 39) about the applicability of the Act to pre-enactment offenders. In amicus's view, the absence of an express provision for such offenders is dispositive because of the assumption that Congress "legislated with [Section 109] in

³ W.S. Gilbert & Arthur Sullivan, "I Am The Very Model of a Modern Major-General," *The Pirates of Penzance* act 1.

mind.” Br. 40 (quoting *Albernaz v. United States*, 450 U.S. 333, 341-342 (1981) (bracketed language added)).

That approach to Section 109 ignores this Court’s recognition that when a necessary or fair “*implication*” arises from a statute, it overrides Section 109’s default rule. See p. 4, *supra*. Amicus is correct (Br. 40) that “legal context” matters in construing the FSA, but here, the relevant context is the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, which established the basic framework for all federal sentencing determinations. Under that framework, a district court considers the advisory Guidelines in effect on the date of sentencing—including any ameliorative amendments that may have taken effect since the date of the underlying offense conduct. See 18 U.S.C. 3553(a)(4)(A)(ii) and (5)(B). At the same time, courts are generally barred from disturbing a sentence of imprisonment after it has been imposed. See 18 U.S.C. 3582(c). By directing the Sentencing Commission to implement the FSA “as soon as practicable” through emergency amendments to “conform[]” the Guidelines with “applicable law,” Congress expressly invoked the machinery of the Sentencing Reform Act.⁴

Amicus overlooks this legal context in his repeated contention (*e.g.*, Br. 17, 39, 50) that Congress could not have intended to tie the FSA’s sentencing reforms to the date

⁴ Congress thus knew that the amended Guidelines would apply prospectively in all initial sentencing proceedings, regardless of the date of the underlying offense conduct. 18 U.S.C. 3553(a)(4)(A)(ii). In contrast, although Congress has authorized the Sentencing Commission, in its discretion, to make Guidelines amendments that reduce prison terms retroactively available to previously sentenced offenders, it has not required the Commission to take that step, 28 U.S.C. 994(u), and thus could not have known whether the Commission’s post-FSA amendments would ultimately have retroactive effect.

when an offender is sentenced (rather than the date of the offense). Echoing Chief Judge Easterbrook, see *Holcomb*, 657 F.3d at 448, amicus characterizes that approach as “partial retroactivity” (Br. 17) and asserts that it would produce consequences “sufficiently odd that Congress could not have intended it” (Br. 47). But Congress embraced that assertedly “odd” notion in the text of the Sentencing Reform Act. See 18 U.S.C. 3553(a)(4)(A)(ii). And far from being odd, having the sentencing court apply current law fulfills the Sentencing Reform Act’s “philosophy” that the Sentencing Guidelines should reflect the “most sophisticated” understanding of which penalties “will most appropriately carry out the purposes of sentencing.” S. Rep. No. 223, 98th Cong., 1st Sess. 74 (1983); see Gov’t Br. 54-55.⁵

McNeill v. United States, 131 S. Ct. 2218 (2011), does not assist amicus (Br. 15, 47). *McNeill* interpreted the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), which imposes a 15-year mandatory minimum sentence on a defendant convicted of unlawful possession of a firearm if, *inter alia*, the defendant has three prior convictions for a “serious drug offense.” 18 U.S.C. 924(e)(1). The Court held that whether a state conviction qualifies as a “serious drug offense” under the ACCA depends on the maximum sentence that could have been imposed for the offense at the time of the defendant’s state conviction, rather than on the

⁵ Amicus speculates (Br. 47) that crack offenders might have engaged in “strategic misconduct,” such as “fugitivity,” to postpone the date of their sentencing hearings. To the extent such a risk exists, however, it exists any time the Sentencing Commission revises the Guidelines. The law generally deters and punishes such misconduct directly. See e.g., 18 U.S.C. 751(a) (crime of escape); 18 U.S.C. 3146 (failure to appear); Sentencing Guidelines § 3C1.1 (obstruction of justice).

content of state law at the time of the later federal sentencing proceeding. 131 S. Ct. at 2224. The Court based its holding on the “plain text of ACCA,” *id.* at 2221, and on the Court’s previous interpretation of adjacent definitions in the ACCA, *id.* at 2222-2223. But the Court also identified a number of reasons why, in the particular context of the ACCA, it would be “absurd” to permit the statute’s applicability to “depend on the timing of the federal sentencing proceeding.” *Id.* at 2223. The Court reasoned that it would frustrate Congress’s plain intent in the ACCA if “subsequent changes in state law can erase an earlier conviction for ACCA purposes.” *Ibid.* “Congress based ACCA’s sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared.” *Ibid.*

In enacting the FSA, by contrast, Congress expressly directed the Commission to issue emergency Guidelines amendments that Congress knew would be immediately applicable in all initial sentencing proceedings, even those involving pre-FSA conduct. 18 U.S.C. 3553(a)(4)(A)(ii). Indeed, *McNeill* notwithstanding, amicus does not dispute that the Guidelines changes required by Section 7 of the FSA, which instructed the Commission to cap or reduce the base offense level for certain offenders, see § 7, 124 Stat. 2374, were immediately effective in sentencing proceedings after November 1, 2010, regardless of the date of the underlying offense conduct. Nor does amicus dispute that the Commission’s emergency changes to the Drug Quantity Table in Sentencing Guidelines § 2D1.1(c) were immediately effective for crack offenders not affected by mandatory minimum penalties. These uncontested applications of FSA-mandated Guidelines to pre-FSA conduct underscore that no *McNeil*-like timing rule based solely on the date of the offense applies in this statutory context.

Amicus correctly observes (Br. 37) that the FSA's increase in the maximum fines for federal drug offenders, see § 4, 124 Stat. 2372-2373, could not be applied to pre-enactment offenders under the Ex Post Facto Clause. But the inference that amicus would draw from that observation—that Congress must have meant to exclude pre-enactment offenders from the FSA's entire package of reforms—does not follow. To the contrary, by directing that the FSA should be implemented immediately through emergency amendments to the Sentencing Guidelines, § 8, 124 Stat. 2374, Congress plainly *did* contemplate that pre-enactment offenders who are sentenced after the FSA's enactment would get “the sweet without the bitter” (Br. 38). See 18 U.S.C. 3553(a)(4)(A)(ii).⁶

4. Finally, Congress's instruction to the Sentencing Commission to submit a report within five years of the Act's enactment on the “impact of the changes in Federal sentencing law under this Act and the amendments made by this Act,” FSA § 10, 124 Stat. 2375, corroborates the inference that Congress intended the FSA's “changes” and “amendments” to be in full effect during that period. Particularly given the likely purpose of the study—to determine whether the FSA's package of reforms *does*, in fact, restore fairness and proportionality to federal cocaine sentencing and eliminate the disparate racial impact of the 100-to-1 ratio—it is doubtful that Congress directed the Commission to study “the impact” of the “amendments” made by the

⁶ The Guidelines provide an exception for when applying the version of the Guidelines in effect on the date of sentencing would violate the Ex Post Facto Clause. See Sentencing Guidelines § 1B1.11(b)(1). While that provision had force when the Guidelines were mandatory, in the government's view, the advisory nature of the Guidelines after *United States v. Booker*, 543 U.S. 220 (2005), removes any ex post facto concerns. See Gov't Br. 29 n.6.

FSA in a period in which those amendments “would not consistently apply.” *United States v. Dixon*, 648 F.3d 195, 202 (3d Cir. 2011).

C. The History and Purposes of the FSA Confirm That Congress Intended Courts To Apply The Act’s Reforms Immediately

The necessary and fair implication from the FSA’s text is confirmed by its history and purposes: to end the racially disparate and disproportionate punishments produced by the 100-to-1 ratio.

1. Amicus acknowledges that the available legislative history of the FSA reflects a “widespread and forceful critique of the 100-to-1 ratio” and of the “racial disparities engendered by the old system” (Br. 50). The legislative debates preceding the passage of the FSA leave no doubt that the unintentional—but undeniable—racial disparity produced by the 100-to-1 ratio deeply disturbed members of Congress. The Sentencing Commission had long warned Congress that the disparate racial impact of the 100-to-1 ratio “foster[ed] disrespect for and lack of confidence in the criminal justice system.” 2002 Report 103. Representative Dan Lungren, one of the original authors of the 1986 legislation that created the 100-to-1 ratio, supported the FSA because of the “sad iron[y]” that “a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue.” 156 Cong. Rec. H6202 (daily ed. July 28, 2010). In a letter to the Senate Judiciary Committee, the president of the NAACP Legal Defense Fund called the 100-to-1 ratio “one of the most notorious symbols of racial discrimination in the modern criminal justice system.” 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010) (state-

ment of Sen. Leahy) (quoting letter from John Payton). That judgment, the legislative record makes plain, was not controversial among members of Congress. See Gov't Br. 46-47.

Against this background, it is hard to believe that Congress, in directing the Sentencing Commission to implement the FSA's reforms "as soon as practicable," nevertheless intended to leave the pre-FSA mandatory minimums in place for thousands of pre-enactment offenders who, like petitioners, had not yet been sentenced when the President signed the FSA into law. Contrary to amicus's view (Br. 52), it is not an "abuse" of legislative history to recognize that no member of Congress remotely defended, let alone supported, the racially disparate effects of a policy that the court of appeals' judgment would leave in place for years into the future. While the floor statements quoted above and in the government's opening brief (at 46-47) may be "isolated" (Br. 52) in the sense that each reflects the view of an individual legislator, amicus does not deny that those statements accurately convey both the widespread abhorrence among members of Congress of the unintended consequences of the 100-to-1 ratio and their opposition to allowing those consequences to continue.

Amicus would nevertheless disregard the legislative history on the ground that it does not speak "directly to the question of retroactivity" (Br. 50). But Congress's concern with the racially disparate effects of the 100-to-1 ratio bears directly on the question at issue in this case: whether Congress intended district courts to continue to impose sentences under that discredited policy for years into the future.

Amicus also acknowledges (Br. 52-54) that, in drafting the FSA, Congress specifically rejected statutory language that would have limited the application of the Act to of-

fenses committed after the date of enactment. See Gov't Br. 44-45. Amicus contends that this history too is irrelevant because “[i]n failing to include an anti-retroactivity clause, Congress merely omitted language that would do what Section 109 already does” (Br. 53). But Congress did not merely “fail[] to include” a provision barring the Act’s application to pre-enactment conduct; it specifically *deleted* such a provision from the predecessor bill on which the FSA was based.

2. No evident reason explains why Congress would have wanted sentencing courts to continue applying, for years after the FSA’s enactment, the same disproportionately severe and racially skewed statutory penalties that it enacted the FSA to purge from federal law. Gov’t Br. 47-48. Neither amicus, nor the members of the court whose judgment he defends, can hypothesize a reason. Cf. *Holcomb*, 657 F.3d at 450 (Easterbrook, C.J.) (acknowledging “no satisfactory answer”). Confronted with this question, amicus invokes a variety of generic propositions about statutory interpretation, including that “no legislation pursues its purposes at all costs,” Br. 50 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987)), and that “legislation involves compromises among competing values,” *id.* at 15. Such propositions do not blunt the only logical inference from Section 8 of the FSA that Congress intended the Act’s reforms to be immediately effective. Amicus is undoubtedly correct (Br. 51-52) that the Act’s 18-to-1 ratio represents a compromise among legislators over the proper degree to which crack cocaine offenses should be punished more severely than powder offenses—that is, over what should *replace* the 100-to-1 ratio. But nothing in the Act or its legislative history remotely suggests that any member of Congress intended or believed that, after the FSA became effective, district courts would continue to impose

unjustifiably harsh new prison sentences under the discredited 100-to-1 ratio.

* * * * *

For the foregoing reasons and those set forth in the government's opening brief, the judgments of the court of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

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Solicitor General

APRIL 2012

**AMICUS
CURIAE
BRIEF**

Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

COREY A. HILL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES
UNION, THE ACLU OF ILLINOIS, THE LEADERSHIP
CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE, THE SENTENCING PROJECT, FAMILIES
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INTEREST OF AMICI

This *amicus curiae* brief is submitted on behalf of the American Civil Liberties Union, the ACLU of Illinois, The Leadership Conference on Civil and Human Rights, The National Association for the Advancement of Colored People, The Sentencing Project, Families Against Mandatory Minimums, Open Society Institute, The Drug Policy Alliance, and StoptheDrugWar.org. Each organization has special interest and/or expertise in criminal justice matters. Their statements of interest are set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

Congress intended the Fair Sentencing Act of 2010 (“FSA”), which reduced the crack/powder ratio from 100:1 to 18:1, to apply to all sentences after its enactment. The statute’s text and legislative history evince Congress’s clear intent that the new crack/powder ratio immediately replace the old and discredited 100:1 ratio. *Amici* therefore join Petitioners and the United States in urging the Court to hold that Petitioners should not have been sentenced under the 100:1 ratio after Congress repudiated it as unfair and discriminatory.

¹ Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party’s counsel authored this brief in whole or in part and that no party or party’s counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici write separately to provide the Court with a history of the cocaine sentencing disparity—including how and why Congress created it, and the prodigious opposition it inspired from bench and bar for nearly two and a half decades as its irrationality and racially discriminatory consequences became increasingly clear. When Congress passed the FSA, it was widely accepted that the 100:1 ratio had no “penological or scientific justification.” *U.S. v. Smith*, 359 F.Supp.2d 771, 777 (E.D.Wis. 2005), and “result[ed] in a disparate impact along racial lines, with black offenders suffering significantly harsher penalties.” *U.S. v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) (footnote omitted). This historical context is indispensable to understanding Congress’s motivations in enacting the FSA, and it should bear on the Court’s assessment of Congressional intent behind reducing the crack/powder disparity from 100:1 to 18:1. Moreover, the Court’s presumption that Congress seeks to avoid unnecessarily vindictive punishment, as well as the rule of lenity, favor applying the reduced ratio to all sentences after the FSA’s enactment.

ARGUMENT

I. **Congress Intended The Fair Sentencing Act To Apply In All Sentencing Proceedings That Occur After Its Enactment.**

Congress passed the FSA “[t]o restore fairness to Federal cocaine sentencing.”² As the bill’s chief sponsor stated on the floor of the Senate, “[e]very day that passes without taking action to solve this

² Pub. L. No. 111-220, 124 Stat. 2372 (2010).

problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust.”³ Senator Dick Durbin (D-Ill.) further explained that when the FSA was “enacted into law, it w[ould] immediately ensure that every year, thousands of people are treated more fairly in our criminal justice system.”⁴ The “restor[ation]” of fair sentencing was necessary because the Anti-Drug Abuse Act of 1986⁵ had created a sentencing scheme that unequally punished comparable offenses involving crack and powder cocaine—two forms of the same drug. Relying on perceived differences in the harmfulness and dangerousness of crack versus powder cocaine, the 1986 Congress created a 100:1 disparity between the amounts of crack versus powder cocaine necessary to trigger particular sentences. Thus, for example, someone convicted of an offense involving just five grams of crack cocaine was subject to the same five-year mandatory minimum federal prison sentence as someone convicted of an offense involving 500 grams of powder cocaine.

There are two particularly glaring flaws of the 1986 Act which the 2010 Congress sought to remedy in the FSA when it reduced the 100:1 ratio. First, since the passage of the 1986 Act, empirical evidence has demonstrated that there is no scientific basis to support the supposed differences between crack and powder cocaine which Congress had initially relied

³ 156 Cong. Rec. S1680-02, *S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin).

⁴ *Id.*

⁵ Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended, in pertinent part, at 21 U.S.C. § 841(b) *inter alia* (2000)).

upon in devising the 100:1 ratio. Second, the ratio, coupled with government enforcement priorities, gave rise to a racially discriminatory sentencing scheme. Under the 100:1 ratio, African American crack cocaine offenders were routinely given much harsher sentences than other cocaine offenders for comparable conduct. Indeed, by 2004, African Americans served virtually as much time in prison for a non-violent drug offense (58.7 months) as whites did for a violent offense (61.7 months).⁶ Having become acutely aware of the discriminatory effects of the 100:1 ratio, Congress passed the FSA and reduced the ratio to 18:1. The sponsors “believe[d] this w[ould] decrease racial disparities and help restore confidence in the criminal justice system, especially in minority communities.”⁷

The FSA’s text and legislative history demonstrate that Congress intended all crack cocaine offenders sentenced after the FSA’s enactment on August 3, 2010, to be sentenced in accordance with the new law—even if their offense conduct occurred before the FSA.⁸ To conclude otherwise would

⁶ Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/efjs03.pdf>.

⁷ Letter from Senators Durbin and Leahy to Attorney General Eric Holder (Nov. 17, 2010) available at [http://www.fdic.org/pdf_lib/fair-sentencing-act-ag-holder-letter-111710\[1\].pdf](http://www.fdic.org/pdf_lib/fair-sentencing-act-ag-holder-letter-111710[1].pdf).

⁸ The questions presented to the Court in Petitioners’ cases differ only in that Petitioner Hill was sentenced after both the FSA and U.S. Sentencing Commission’s Emergency Amendments—promulgated to implement the FSA, as required by that law—went into effect, whereas Petitioner Dorsey was sentenced after the enactment of the FSA but before the Guidelines Amendments went into effect.

eviscerate Congress's actual intent, and mistakenly impute to Congress the intention to "restore fairness to Federal cocaine sentencing"⁹ only for some defendants while allowing others to be sentenced under the old repudiated ratio even after the FSA went into effect.

That conclusion cannot be reconciled with either the FSA's overriding purpose or its specific provisions mandating speedy implementation. In particular, Section 8 of the FSA¹⁰ requires the U.S. Sentencing Commission to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law" no later "than 90 days after the date of enactment of this Act."¹¹ As the Third Circuit explained, "'applicable law' must be the FSA, not the 1986 Act, because Congress sought to bring the Guidelines in conformity with the 18:1 ratio . . ." *U.S. v. Dixon*, 648 F.3d 195, 200 (3d Cir. 2011). By directing the Sentencing Commission to issue prompt emergency guideline amendments implementing the new 18:1 ratio, Congress "evince[d] an intent to apply the FSA to sentences given as of its effective date." *Id.* at 201.

Section 10 of the FSA further confirms Congress's intent. Section 10 requires the Sentencing Commission to "study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act"

⁹ Pub. L. No. 111-220, 124 Stat. 2372.

¹⁰ *Id.* at § 8.

¹¹ *Id.*

not later than five years after the FSA's enactment.¹² But because the relevant statute of limitations for charging cocaine offenses is five years,¹³ if the FSA did not apply to conduct prior to its passage, many defendants over the next five years would be sentenced under pre-FSA mandatory minimums. The illogical result, then, would be that the Sentencing Commission would be unable to compile a meaningful report requested by Congress within five years on the FSA's impact on federal sentences. As the Third Circuit has observed, if district courts continue to apply the old 100:1 ratio to all pre-FSA conduct, the report will be "incomplete, at best, and incomprehensible, at worst" because the FSA would "not yet be[] uniformly applied until after the report was due." *Dixon*, 648 F.3d at 202 (internal quotation marks omitted). In short, the only way the five-year report would be of any use to Congress is if Congress intended the FSA to apply to all sentences after its enactment.

Despite this uniform evidence of legislative intent, apparent in both the text and legislative history of the FSA, the Seventh Circuit held that Petitioners should be sentenced under the repudiated 100:1 ratio. The Seventh Circuit reasoned that the general federal savings statute, 1 U.S.C. § 109, prevents the FSA from applying to people whose offense conduct predates the FSA—even if they are sentenced after the FSA's passage. Section 109, which Congress initially passed in 1871 and has reenacted and recodified several times since, provides that "[t]he repeal of any statute shall not

¹² *Id.* at § 10.

¹³ See 18 U.S.C. § 3282(a) (2006).

have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act so shall expressly provide . . .” According to the Seventh Circuit, Congress did not “expressly provide” that the FSA applies to people like Petitioners Hill and Dorsey whose conduct predated the new law. The Seventh Circuit’s error was in focusing on the language of § 109 rather than the language of the FSA. In so doing, it ignored the axiomatic constitutional principle that one legislature “cannot abridge the powers of a succeeding legislature.” *Lockhart v. U.S.*, 546 U.S. 142, 147 (2005) (Scalia, J. concurring) (quoting *Fletcher v. Peck*, 6 Cranch 87, 135 (1810)). “Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in *whatever fashion it deems appropriate*.” *Id.* at 148 (emphasis added). This Court has therefore held that § 109 “cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.” *Great Northern Ry. Co. v. U.S.*, 208 U.S. 452, 465 (1908) (emphasis added).

The Seventh Circuit disregarded this Court’s guidance when it held that absent an express provision, Congress could not have intended the FSA to apply to defendants like Petitioners. Under *Lockhart*, the FSA’s text and history provide the “necessary implication” that Congress intended the FSA to apply to all sentences after its enactment. Moreover, to the extent that the Court perceives any ambiguity in the FSA, insofar as its intended applicability is concerned, the “rule of lenity” requires the Court to “resolve the ambiguity in [Petitioner Hill and Dorsey’s] favor.” *U.S. v.*

Granderson, 511 U.S. 39, 54 (1994). See Part IV, *infra*. For the foregoing reasons, *amici* join Petitioners and the United States in urging the Court to reverse the Seventh Circuit's decisions upholding Petitioners' sentences under the discriminatory and empirically bereft 100:1 ratio.¹⁴

II. Congress Created The 100:1 Ratio In Response To A Media Frenzy And Without Any Evidentiary Basis.

Crack cocaine began to appear in urban areas like New York, Miami, and Los Angeles between 1984 and 1985. By 1986, crack was widely available in large U.S. cities and relatively inexpensive. Upon entering the mainstream drug culture, crack "immediately absorbed the media's attention. . . . [A]ccounts of crack-user horror stories appeared daily on every major channel and in every major

¹⁴ The Court recently held in *Reynolds v. U.S.*, No. 10-6549, slip op. at 6 (Jan. 23, 2012), that the federal Sex Offender Registration and Notification Act ("SORNA"), 120 Stat. 590, 42 U.S.C. §16901 *et seq.* (2006), does not require offenders convicted before the Act became law "to register before the Attorney General validly specifies that the Act's registration provisions apply to them." *Reynolds* is distinguishable from the present cases. First, the text of SORNA delegated to the Attorney General the "authority to specify the applicability of the requirements . . . to sex offenders convicted before the enactment of this chapter." 42 U.S.C. § 16913(d). In addition, when Congress passed SORNA, it acted against a patchwork quilt of conflicting state rules and it explicitly included a grace period providing the States with at least three years to bring their systems into compliance with federal standards. *Reynolds*, slip op. at 7; 42 U.S.C. §16924. There is no comparable evidence in the FSA or the circumstances surrounding its passage indicating that Congress did not intend the FSA to be immediately effective.

newspaper." *U.S. v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo. 1994) (footnotes omitted) *rev'd*, 34 F.3d 709 (8th Cir. 1994)). The late Judge Clyde S. Cahill of the Eastern District of Missouri recounted that "[i]mages of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society." *Id.* Indeed, "[b]etween 1985 and 1986, over 400 reports had been broadcast by the networks." *Id.*

In June 1986, the nation's simmering fear of crack reached a tragic crescendo. On June 17, 1986, the defending NBA champion Boston Celtics selected African American college basketball star Len Bias as the second overall pick in the NBA Draft. Two days later, Bias died of a drug overdose. His death sparked a national media frenzy largely precipitated by a mistaken assumption that his death had been caused by crack cocaine.¹⁵ In fact, Bias died of a powder cocaine overdose,¹⁶ but the inaccurate reports identifying crack as the cause of death, combined with the public's already potent association between crack and African Americans, created an

¹⁵ Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*. Boston Globe, July 5, 2006. http://www.boston.com/news/globe/editorial_opinion/oped/article/s/2006/07/05/the_disparity_on_crack_cocaine_sentencing/.

¹⁶ U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy 123 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006, 108 Stat. 1796) [hereinafter 1995 USSC REPORT].

irrepressible momentum against this new form of cocaine.

In the aftermath of Bias's death and with midterm elections quickly approaching, Congress set aside the regular legislative process¹⁷ and expedited consideration of the Anti-Drug Abuse Act of 1986. At the time, the late Senator Charles Mathias (a Republican from Bias's home state of Maryland) lamented that the bill "did not emerge from the crucible of the committee process, tempered by the heat of debate. . . . Many of the provisions of the bill have never been subjected to committee review."¹⁸ Reflecting on this history, Judge Myron H. Bright of the Eighth Circuit explained that "[t]he political climate surrounding the enactment of the [Anti-Drug Abuse Act of 1986] provides the first glimpse at how Congress and the Sentencing Commission created a crack cocaine sentencing scheme untethered to the goals of sentencing." *U.S. v. Brewer*, 624 F.3d 900, 911 (8th Cir. 2010) (Bright, J., concurring in part and dissenting in part). As a consequence of the Act's expedited schedule, there was no committee report to document Congress's intent in passing the Act or to analyze the legislation. The House of Representatives held few hearings on the enhanced penalties for crack offenders, and the Senate conducted only a single hearing on the 100:1 ratio, which lasted only a few hours.¹⁹ The abbreviated legislative history of the 1986 Act does not provide a

¹⁷ 132 Cong. Rec. S13741-01 (daily ed. Sept. 26, 1986) (statement of Sen. Mathias).

¹⁸ *Id.*

¹⁹ William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1253 (1996).

single consistently cited rationale for the lopsided crack/powder penalty structure. According to Representative Dan Lungren (R-CA), who helped write the law in 1986, Congress “didn’t really have an evidentiary basis for [the 100:1 disparity].”²⁰

President Reagan signed the bill into law on October 27, 1986.²¹ The Act²² established mandatory minimum sentences for federal drug trafficking crimes and created the 100:1 sentencing disparity between powder and crack cocaine.²³ To punish “major” and “serious” cocaine traffickers,²⁴ the Act provided that individuals convicted of trafficking crimes involving 500 grams of powder cocaine—which yields between 2,500 and 5,000 doses²⁵—must be sentenced to at least five years imprisonment.²⁶ But the corresponding amount of crack necessary to trigger the Act’s same five-year mandatory minimum was just five grams (the weight of two pennies), which yields between 10 and 50 doses.²⁷ The Act also provided that those individuals convicted of distribution crimes involving 5000 grams of powder cocaine receive at least 10 years’ imprisonment,²⁸

²⁰ 156 Cong. Rec. H6196-01, *H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren).

²¹ See Congressional Quarterly Almanac, *Congress Clears Massive Anti-Drug Measure*, 99th Cong., 2d Sess., Vol. 42 at 92 (1986) [hereinafter CQ Almanac].

²² Pub. L. No. 99-570, 100 Stat. 3207.

²³ See 1995 USSC REPORT at 116.

²⁴ *Id.* at 117-18.

²⁵ U.S. Sentencing Comm'n, Report to Congress: Federal Cocaine Sentencing Policy 63 (2007) [hereinafter 2007 USSC REPORT].

²⁶ *Id.* at 2-3.

²⁷ *Id.* at 63.

²⁸ 1995 USSC REPORT, at 116.

whereas a mere 50 grams of crack triggered the same 10-year mandatory minimum.²⁹ Two years later, Congress intensified its war against crack cocaine: the Omnibus Anti-Drug Abuse Act of 1988³⁰ created a five-year mandatory minimum sentence for simple possession³¹ of five grams or more of crack cocaine. Meanwhile, the maximum penalty for simple possession of any amount of powder cocaine (as for controlled substances generally) remained a misdemeanor punishable by no more than one year in prison.

A. Both Scientific And Sociological Evidence Demonstrate That There Was No Justification For The 100:1 Ratio.

Soon after Congress enacted the 100:1 ratio, objective evidence began mounting that the disparity could not be justified. Indeed, as early as 1993, then-Chief Judge Lyle E. Strom of the District of Nebraska wrote that "the evidence is clear that the cocaine molecule is the same whether the drug being used is powder form or in crack form, and is not inherently more dangerous in crack form." *U.S. v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987 *5 (D. Neb. 1993). In 1996, the Journal of American Medical Association (JAMA) published a study concluding that the physiological and psychoactive

²⁹ Pursuant to its mandate to ensure that the federal sentencing guidelines are consistent with all federal laws, the U.S. Sentencing Commission in 1987 applied this same 100:1 ratio to the then-mandatory Sentencing Guidelines.

³⁰ Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).

³¹ The 1986 Act's five-year mandatory minimum did not apply to simple possession of crack cocaine.

effects of cocaine are similar regardless of whether it is in the form of powder or crack.³² In any composition, cocaine is a potent stimulant of the central nervous system, and, as this Court has previously recognized, both powder and crack produce the same types of physiological and psychotropic effects on the human brain. *Kimbrough v. U.S.*, 552 U.S. 85, 94 (2007).³³ Indeed, crack is neither significantly more addictive than powder cocaine nor more immediately addicting.³⁴ Crack and powder cocaine are simply the same drug prepared differently.³⁵ The 1996 JAMA study finding similar physiological and psychoactive effects of cocaine regardless of its form³⁶ concluded that cocaine's propensity for dependence varies by the method of use, amount used, and frequency—not by the form of the drug.³⁷

By the time Congress passed the FSA, the undeniable consensus in the scientific and legal community was that none of Congress's earlier rationales for the disparity were supported by reliable empirical evidence.³⁸ As the Sentencing

³² D. K. Hatsukami & M. W. Fischman, *Crack Cocaine And Cocaine Hydrochloride: Are The Differences Myth Or Reality?*, 276 Journal of Am. Med. Ass'n, No. 19, 1580 (Nov. 1996).

³³ See also U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy 17 (2002) [hereinafter 2002 USSC REPORT].

³⁴ D. K. Hatsukami & M. W. Fischman, at 1580.

³⁵ Crack is formed by dissolving powder cocaine in water and treating it with an alkali such as baking soda.

³⁶ D. K. Hatsukami & M. W. Fischman, at 1580.

³⁷ *Id.*

³⁸ *U.S. v. Smith*, 359 F. Supp.2d 771, 777 (E.D. Wis. 2005) ("[c]ourts, commentators and the Sentencing Commission have

Commission stated in 2007, “[c]rack cocaine and powder cocaine are both powerful stimulants, and both forms of cocaine cause *identical effects*.³⁹ In short, there is now widespread recognition that the 1986 Congress, in its haste, created a cocaine sentencing scheme that lacked any rational relationship to reality.

III. The 100:1 Ratio Resulted In Extreme Racial Disparities In Federal Cocaine Sentencing.

The most catastrophic consequence of the senseless 100:1 ratio has been the disparate and discriminatory impact on African Americans. Even though the majority of crack users are white and Hispanic, African Americans comprise the vast majority of those convicted of crack cocaine offenses. For example, in 2010, whites constituted 7.3% and African Americans an astonishing 78.5% of the defendants sentenced under the federal crack cocaine laws.⁴⁰ Moreover, despite Congress’s intention to punish major and serious cocaine traffickers,⁴¹ the five-year mandatory minimums for offenses involving just five grams of crack—which can yield as little as

long criticized this disparity, which lacks persuasive penological or scientific justification.”).

³⁹ 2007 USSC REPORT, at 62 (emphasis added).

⁴⁰ U.S. Sentencing Comm’n, 2010 Sourcebook of Federal Sentencing Statistics, Table 34 (2010) available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBtoc10.htm [hereinafter 2010 Sourcebook of Federal Sentencing Statistics].

⁴¹ See 1995 USSC REPORT at 117-18.

10 doses⁴²—punished enormous numbers of very low-level offenders.

The enforcement against and prosecution of African Americans for crack cocaine offenses, combined with the 100:1 ratio, has resulted in African Americans serving substantially more time in prison for crack cocaine offenses than defendants for powder cocaine offenses. The average sentence for a crack cocaine offense in 2010 was 111 months, while the average sentence for a powder cocaine offense was 84.9 months.⁴³ From 1994 to 2003, the average time African American drug offenders served in prison increased by 77%, compared to an increase of 33% for white drug offenders.⁴⁴ By 2004, African Americans served virtually as much time in prison for a nonviolent drug offense (58.7 months) as whites did for a violent offense (61.7 months).⁴⁵ Before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites; four years later, it was 49% higher.⁴⁶ Indeed, in large part due to the crack

⁴² 2007 USSC REPORT at 63.

⁴³ 2010 Sourcebook of Federal Sentencing Statistics, at Figure J.

⁴⁴ Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1994, Table 6.11, at 85; Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112.

⁴⁵ Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112.

⁴⁶ B.S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed 20* (1992), available at [http://www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/\\$file/geneffmm.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/$file/geneffmm.pdf).

mandatory minimums, the African American prison population reached staggering proportions.⁴⁷

Congress's misinformed assumptions that there are inherent differences between two forms of the same drug, when in fact crack and powder cocaine have the same effects, resulted in a system that treated comparable conduct unequally with African Americans bearing the brunt of such stark inequality. Given that a defendant's race was the factor most commonly and obviously correlated with harsher penalties, the 100:1 ratio came to represent the modern torchbearer of racism in our criminal justice system.

⁴⁷ See Bureau of Justice Statistics, *Prison Inmates at Midyear 2008—Statistical Tables*, Table 16, at 17 available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf> (In 2008 there were approximately 846,000 African American men held in state or federal prison or in local jails.); Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002), available at http://www.justicepolicy.org/images/upload/0209_REP_CellblocksClassrooms_BB-AC.pdf (In 2000, there were approximately 791,600 African American men in prisons and jails, and only 603,032 African American men enrolled in higher education); see also Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 American Psychologist, No. 7, at 716 (July 1998) (At the beginning of the 1990s, the United States had more African American men between the ages of 20 and 29 in the criminal justice system than in college); Marc Mauer, *Race, Drugs Laws & Criminal Justice, from Symposium: U.S. Drug Laws: The New Jim Crow?*, 10 Temp. Pol. & Civ. Rts. L. Rev. 321, 324 (2001) (One of every 14 African American children has a parent in prison or jail); ACLU et al., *Caught in the Net: The Impact of Drug Policies on Women and Families* 49 (2005) (African American children are nine times more likely than white children to have a parent incarcerated).

A. The Racial Disparities Resulting From The 100:1 Ratio Have Had A Devastating Impact on Individual Lives.

The story of Hamedah Hasan⁴⁸ epitomizes the unduly harsh devastation that the 100:1 ratio has wreaked on individuals and their families. When Ms. Hasan was 21 years old, she was in a horribly abusive relationship with a man in Portland, Oregon. This man repeatedly cursed at, slapped, punched and kicked Ms. Hasan. Eventually, Ms. Hasan, the mother of two young children, fled to live with a cousin in Omaha, Nebraska, where she found sanctuary—a safe place to live hundreds of miles from her abuser.

Unfortunately, Ms. Hasan's cousin dealt crack cocaine. With few resources, and indebted to her cousin for helping her escape her abusive relationship, Ms. Hasan agreed to run various errands and transfer some money in connection with her cousin's drug trafficking. Knowing this was not a place for her two young daughters, Ms. Hasan found the strength to move back to Portland to get away from the drug operation, to create a better life for her daughters, and to earn an honest living.

⁴⁸ Letter from Hamedah Hasan to President Barack Obama (Feb. 2010) available at <http://www.dearmrpresidentyesyoucan.org/2010.02%20HH%20personal%20Commutation%20Letter%20to%20President.pdf>; see also ACLU Profile from the War on Drugs: Hamedah Hasan (Jun. 15, 2011) available at <http://www.aclu.org/blog/criminal-law-reform/profile-war-drugs-hamedah-hasan>.

However, Ms. Hasan was indicted and convicted of conspiracy to distribute crack cocaine during her time in Omaha. Despite her previously clean record, her sentencing judge found his hands tied by a combination of mandatory minimums for crack cocaine and the then-mandatory sentencing guidelines. *U.S. v. McMurray*, 833 F. Supp. 1454, 1485 (D. Neb. 1993) ("For whatever value it may have, it is my strongly felt opinion that . . . [Ms. Hasan] ought [not] to spend the rest of [her] days in prison. . . . Since my disagreement with these sentences is with many of the normative values underlying them, I am justified only in voicing that disagreement."). Ms. Hasan received a life sentence, which was later reduced to 27 years. Had she been convicted of an offense involving powder cocaine, she would have returned to her family years ago.⁴⁹ In a letter she wrote to President Obama in 2010 seeking clemency, Ms. Hasan explained that during her more than 17 years of incarceration, she had "taken long, hard looks at [her]self. [She has] done everything within [her] power to redeem [her]self for [her] past transgressions by learning and demonstrating what it means to be a community asset versus a liability."⁵⁰ Ms. Hasan's story is not unique. She is one of many who have suffered under the unjustified 100:1 ratio, and her story demonstrates the urgent need to end the imposition of sentences under that fundamentally unfair scheme.

⁴⁹ Because the U.S. Sentencing Commission's FSA Guideline Amendments are fully retroactive, Ms. Hasan was able to apply for a reduction in her sentence on November 1, 2011.

⁵⁰ Letter from Hamedah Hasan to President Barack Obama (Feb. 2010).

B. The United States Sentencing Commission Has Recognized The Discriminatory Impact Of The 100:1 Ratio Since 1995 And Urged Its Repeal.

The Sentencing Commission, a bipartisan agency within the judicial branch, recognized the crack/powder disparity's distressing discriminatory impact beginning in 1995. The Commission reported to Congress that the "100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants."⁵¹ Based largely on these discriminatory consequences, the Commission told Congress on four occasions that there was no basis for the 100:1 ratio. In its 1995, 1997, 2002, and 2007 reports to Congress, the Commission recommended increasing the crack quantity thresholds necessary to trigger mandatory minimum sentences.

On February 28, 1995, the Commission unanimously recommended that changes be made to the cocaine sentencing structure, including a reduction in the 100:1 ratio.⁵² On May 1, 1995, the Commission submitted to Congress proposed legislation and amendments to its sentencing guidelines which would have equalized the penalties for crack and powder cocaine possession and distribution at the level of powder cocaine, and provided sentencing enhancements for violence or

⁵¹ 1995 USSC REPORT, at 154.

⁵² U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 1 (1997) [hereinafter 1997 USSC REPORT].

other harms.⁵³ The Commission "acknowledged that its crack guidelines bear no meaningful relationship to the culpability of defendants sentenced pursuant to them. . . . [T]he Commission has never before made such an extraordinary *mea culpa* acknowledging the enormous unfairness of one of its guidelines." *U.S. v. Anderson*, 82 F.3d 436, 449-50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnotes omitted).

Later that year, Congress and the President rejected the Commission's recommended guideline amendment equalizing the powder and crack penalties.⁵⁴ In addition, Congress explicitly directed the Commission to provide new recommendations in which "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."⁵⁵

In April 1997, the Commission issued a second report urging the reduction of the 100:1 ratio, which again highlighted the ratio's discriminatory impact. Indeed, the report's very first paragraph states that "[c]ritics [of the cocaine sentencing disparity] have focused on the differences in federal penalty levels between the two principal forms of

⁵³ See Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, amend. No. 5 (proposed May 10, 1995).

⁵⁴ Act of Oct. 30, 1995, Pub. L. No 104-38, § 1, 109 Stat. 334 (1995) (an Act to disapprove of amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences). This marked the first time in the guidelines' history that Congress and the President rejected a guideline amendment that the Commission had approved. *Anderson*, 82 F.3d at 449-50 (Wald, J., dissenting).

⁵⁵ § 2(a)(1)(A), 109 Stat. at 334.

cocaine . . . and on the disproportionate impact the more severe crack penalties have had on African-American defendants.”⁵⁶ The Commission stated that it was “firmly and unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine.”⁵⁷

In 2002, the Commission examined the disparity for a third time. The Commission held hearings with a wide range of experts who overwhelmingly concluded that there is no valid scientific or medical distinction between powder and crack cocaine.⁵⁸ After the 2002 hearings, the Commission issued a new report on crack and powder cocaine disparities and once again found that the 100:1 ratio is unjustified.⁵⁹ Specifically, the Commission found that the crack penalties: 1) exaggerated the relative harmfulness of crack cocaine; 2) swept too broadly and applied most often to lower level offenders; 3) overstated the seriousness of most crack cocaine offenses and failed to provide adequate proportionality; and 4) mostly affected minorities.⁶⁰ Accordingly, the Commission recommended that Congress increase the five-year mandatory minimum threshold quantity for crack cocaine offenses.⁶¹

⁵⁶ 1997 USSC REPORT, at 1.

⁵⁷ 1997 USSC REPORT, at 2.

⁵⁸ 2002 USSC REPORT, at Appendix E, E-1–E-6.

⁵⁹ *Id.* at v.

⁶⁰ *Id.* at v-viii.

⁶¹ *Id.* at 104-06.

In 2007, the Commission reiterated its objections to federal cocaine sentencing policy and urged Congress to act. The Commission stated that “[f]ederal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission.”⁶² In this report, the Commission repeated its four findings from the 2002 report, including that the “severity of crack cocaine penalties mostly impacts minorities.”⁶³ Thus, while it was the 111th Congress that finally reduced the 100:1 ratio, the Commission had implored every Congress since the 104th to reform the discriminatory law.

C. Federal Judges Have Condemned The Racially Discriminatory 100:1 Ratio For Decades.

The Commission’s zealous opposition to the 100:1 ratio has been matched by that of federal district and circuit court judges across the country from all ideological backgrounds. Recognizing that the 100:1 ratio resulted in disturbing racial disparities, numerous federal judges expressed their distress and frustration over this discredited policy for many years. The judicial outcry over the 100:1 ratio appears to be unprecedented in our history—perhaps no other single sentencing policy has inspired such harsh condemnation by so many

⁶² 2007 USSC REPORT, at 2 (emphasis added).

⁶³ *Id.* at 8.

federal judges. In 1997, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that “[i]t is our strongly held view that the” 100:1 ratio “can not be justified and results in sentences that are unjust and do not serve society’s interest.”⁶⁴

Judge Myron H. Bright of the Eighth Circuit has been condemning the 100:1 ratio since 1992, when he wrote that “[g]iven the precedents of this court, I find myself obliged to concur in that holding. . . . I write separately to note the racial injustice flowing from this policy.” *U.S. v. Williams*, 982 F.2d 1209, 1214 (8th Cir. 1992) (Bright, J., concurring). By 2010, Judge Bright insisted that “[t]he disproportionate impact of the crack cocaine guidelines on minorities should concern every federal judge.” *U.S. v. Brewer*, 624 F.3d 900, 913 n. 14 (8th Cir. 2010) (Bright, J., concurring in part and dissenting in part).

Another early and passionate critic of the ratio was Judge Nathaniel R. Jones of the Sixth Circuit. In 1996, Judge Jones pointedly noted that “the African-American community has borne the brunt of enforcement of the 100:1 ratio.” *U.S. v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (Jones, J., concurring). Judge Jones urged his colleagues to revisit the constitutionality of the ratio, arguing that “[t]he longer the policies exist, the greater the risk

⁶⁴ Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), *reprinted in* 10 FED. SENTG RPTR. No. 4, at 194 (Jan./Feb. 1998).

that we send a message to the public that the lives of white criminals are considered by the U.S. justice system to be at least 100 times more valuable and worthy of preservation than those of black criminals." *Id.* at 1422 (internal quotation marks omitted).

Judges of the Second, Seventh, and Ninth Circuits echoed Judge Jones' condemnation of the ratio. In 1995, Judge Guido Calabresi of the Second Circuit asserted that the "disproportionate impact that the 100-to-1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling... . the statistical evidence demonstrating the discriminatory impact of the current sentencing differential is now irresistible." *U.S. v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) (internal quotation marks omitted). The late Judge Robert Boochever of the Ninth Circuit explained that "[a]lthough I find the result in this case to be shocking, in that the punishment for the crack cocaine offense is the same as the punishment that would have been imposed for a comparable offense involving 100 times as much powder cocaine, and the evidence indicates that 92% of federal prosecutions for crack cocaine, which require the enormously higher terms of imprisonment, involve African-Americans, I am compelled to concur." *U.S. v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring). In 1996, Judge Richard D. Cudahy of the Seventh Circuit wrote that "the extraordinary impact of the 100:1 ratio will provoke examination and reexamination however many efforts are made to lay the matter to rest." *U.S. v. Reddrick*, 90 F.3d 1276, 1284 (7th Cir. 1996) (Cudahy, J., concurring).

Starting in the early 1990s, district court judges sitting at the front lines of federal cocaine sentencing likewise renounced the ratio's discriminatory impact. In 1993, Judge Spencer Letts of the Central District of California protested, "I, for one, do not understand how it came to be that the courts of this nation, which stood for centuries as the defenders of the rights of minorities against abuse at the hands of the majority, have so far abdicated their function that this defendant must serve a ten year sentence. . . In upholding mandatory minimum sentences, the courts have instituted racial disparity in sentencing." *U.S. v. Patillo*, 817 F. Supp. 839, 843, n.6 (C.D. Cal. 1993). The same year, then-Chief Judge Lyle E. Strom of the District of Nebraska explained that "[a] by-product of this inordinate disparity is that members of the African American race are being treated unfairly in receiving substantially longer sentences than caucasian[s]." *U.S. v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987 *5 (D. Neb. 1993).

When Judge Richard G. Kopf of the District of Nebraska sentenced Hamedah Hasan in 1993, he lamented "the nearly overwhelming statistical evidence that blacks are prosecuted much more frequently and 'disproportionately' for 'crack' violations than whites and that blacks are consequently much more likely than whites to be subjected to harsh sentences under the 'crack' guidelines." *U.S. v. McMurray*, 833 F. Supp. 1454, 1461 (D. Neb. 1993). Two years later, he wrote that "it is now beyond doubt that the 100-to-1 ratio creates unnecessary and unintended sentencing disparity . . . For example, there is the very troubling problem of unintentional but nevertheless

unwarranted disparity insofar as ethnic or racial minorities are concerned." *U.S. v. Thompson*, 905 F. Supp. 676, 679 (D. Neb. 1995).

In 1994, the late Judge Clyde S. Cahill Jr. of the Eastern District of Missouri held that the 100:1 ratio violated the Equal Protection rights of an African American crack defendant. *U.S. v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) *rev'd*, 34 F.3d 709, (8th Cir. 1994). Judge Cahill asserted "that this one provision, the crack statute, has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods, usually during the most productive time of their lives." 846 F. Supp. at 770. He found the "disparity . . . so significantly disproportional that it shocks the conscience of the Court and invokes examination." *Id.*

Ten years later, district court judges continued to criticize the disparity. In 2005, Judge Lynn S. Adelman of the Eastern District of Wisconsin called the ratio "notorious," and summarized that "[c]ourts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification, and creates a racially disparate impact." *U.S. v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005). Judge William E. Smith of the District of Rhode Island recounted that "approximately 85% of the offenders sentenced for crack cocaine violations are black . . . and that this leads to, at the very least, a perception that the crack/powder disparity is racially-motivated." *U.S. v. Perry*, 389 F. Supp. 2d 278, 302 (D.R.I. 2005). Judge Shira A. Scheindlin of the Southern District of New York wrote that "the heavy crack cocaine sentences .

. . . are disproportionately imposed on young black males." *U.S. v. Fisher*, 451 F. Supp. 2d 553, 561 (S.D.N.Y. 2005) (footnote omitted) (vacated and remanded *U.S. v. Thompson*, 528 F.3d 110 (2d Cir. 2008)).

In 2006, Judge Gregory A. Presnell of the Middle District of Florida explained that "the crack/powder disparity results in a disparate impact along racial lines, with black offenders suffering significantly harsher penalties." *U.S. v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) (footnote omitted). In 2009, Judge Joan B. Gottschall of the Northern District of Illinois departed from the Sentencing Guidelines' ratio, citing "ample evidence that the crack-to-powder ratio is unjustifiable and unjust, is racially discriminatory in impact and is not proportionate." *U.S. v. Edwards*, No. 04-CR-1090-5, 2009 WL 424464, *3 (N.D. Ill. 2009). Judge Kimba M. Wood of the Southern District of New York wrote that the ratio "fosters disrespect for the criminal justice system because of its racial impact." *U.S. v. Monroe*, No. 05-CR-1042-01, 2009 WL 1448959, *1 n.1 (S.D. N.Y. 2009). Similarly, Judge Mark W. Bennett of the Northern District of Iowa argued in 2009 that the ratio's "disproportionate impact on black offenders fosters disrespect for and lack of confidence in the criminal justice system." *U.S. v. Gully*, 619 F. Supp. 2d 633, 641 (N.D. Iowa 2009).

Circuit Court judges also continued to criticize the discriminatory ratio. In 2006, Judge Rosemary Barkett of the Eleventh Circuit wrote that "[t]he ratio has been subject to widespread criticism almost since its inception. . . . This differential in sentencing creates an unwarranted disparity that has been

correlated with racial disparities and that undermines the public confidence in the criminal justice system.” *U.S. v. Williams*, 472 F.3d 835, 846 n.4 (11th Cir. 2006) (dissent from denial of rehearing en banc). In 2009, Judges Carlos F. Lucero, Timothy M. Tymkovich, and Jerome A. Holmes of the Tenth Circuit, in a per curiam order, noted “that the implementation of the 100-to-1 quantity ratio more greatly impacts African-Americans across the justice system as a whole.” *U.S. v. Lasley*, 331 Fed. Appx. 600, 602 (10th Cir. 2009) (per curiam). Last year, Judge Andre M. Davis of the Fourth Circuit concluded that the “ballooning of the percentage of blacks incarcerated over the past 25 years directly corresponds with the disparate treatment of crack and powder cocaine.” *U.S. v. Gregg*, 435 Fed. Appx. 209, 221 (4th Cir. 2011) (Davis, J., concurring).

This Court, too, has grappled with the 100:1 ratio and its discriminatory impact. As early as 1996, Justice Stevens characterized as “undisputed” the fact “that the brunt of the elevated federal penalties falls heavily on blacks.” *U.S. v. Armstrong*, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting). In *Kimbrough v. U.S.*, 552 U.S. 85 (2007), the Court reviewed the history of the 100:1 ratio and noted that the Commission had found that the disparity in cocaine sentencing “fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race.” *Id.* at 98 (internal quotation marks omitted). The Court acknowledged that the Commission had long objected to the ratio in part because “[a]pproximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required

by the 100-to-1 ratio are imposed primarily upon black offenders." *Id.* (internal quotation marks omitted).

D. Congress Understood The Discriminatory Consequences Of The 100:1 Ratio When It Passed The FSA And Explicitly Sought To Redress This Longstanding Injustice.

The landscape within which Congress passed the FSA was dominated by resounding criticism of a policy that had no "penological or scientific justification," *U.S. v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005), and had become "one of the most notorious symbols of racial discrimination in the modern criminal justice system."⁶⁵

The successful legislative effort followed an Executive call to action. The Obama administration repeatedly and publicly condemned the 100:1 ratio, citing its discriminatory effects. Attorney General Eric Holder asserted that "[i]t is the view of this Administration that the 100-to-1 crack-powder sentencing ratio is simply wrong. It is plainly unjust to hand down wildly disparate prison sentences for materially similar crimes. It is unjust to have a sentencing disparity that disproportionately and illogically affects some racial groups."⁶⁶ Similarly,

⁶⁵ 156 Cong. Rec. S1680-02, *S1683 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy) (quoting letter to the Senate Judiciary Committee from John Payton, the president of the NAACP Legal Defense Fund).

⁶⁶ Attorney General Eric Holder, Remarks as Prepared for Delivery at the D.C. Court of Appeals Judicial Conference (June 19, 2009) (available at www.usdoj.gov/ag/speeches/2009/ag-speech-090619.html); *see also* Attorney General Eric Holder,

Assistant Attorney General Lanny Breuer recounted that "Sentencing Commission data confirms that in 2006, 82 percent of individuals convicted of federal crack cocaine offenses were African American, while just 9 percent were White. . . . The impact of the [crack/powder ratio] has fueled the belief across the country that federal cocaine laws are unjust."⁶⁷ Having heard from the Obama Administration, the Sentencing Commission, and numerous members of the federal judiciary that the 100:1 ratio was discriminatory, a bipartisan coalition of the 111th Congress sought to correct the injustice with the FSA: "There is a bipartisan consensus that current cocaine sentencing laws are unjust. Now Democrats and Republicans have come together to address the issue in a bipartisan way. . . . [T]he Senate Judiciary

Remarks at the National Black Prosecutors Association's Profiles in Courage Luncheon (July 22, 2009) (available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0907221.html>) ("I have seen first-hand the effect that disparities in drug sentences have had on our communities. In my career as a prosecutor and as a judge, I saw too often the cost borne by the community when promising, capable young people sacrificed years of their futures for *non-violent* offenses."); Attorney General Eric Holder, Testimony before the United States House of Representatives Committee on the Judiciary (May 14, 2009) (available at <http://www.usdoj.gov/ag/testimony/2009/ag-testimony-090514.html>); Attorney General Eric Holder, Remarks at Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium (June 24, 2009) (available at <http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html>).

⁶⁷ Assistant Attorney General Lanny Breuer, Statement before the United States Senate Committee on the Judiciary Subcommittee on Crime and Drugs (Apr. 29, 2009) (available at <http://www.judiciary.senate.gov/pdf/09-0429BreuerTestimony.pdf>).

Committee reported the [FSA] by a unanimous 19-to-0 vote.”⁶⁸

On the day the FSA passed in the Senate, Senator Dick Durbin explained that “the net result of” the crack/powder disparity “was that the heavy sentencing we enacted . . . took its toll primarily in the African-American community. . . . It was the same cocaine, though in a different form, and [African Americans] were being singled out for much more severe and heavy sentences.”⁶⁹ Senator Durbin later said that “[t]his disparity was one of the most significant causes of unequal incarceration rates between African Americans and Caucasians. The following statistic is chilling: In this country, African Americans are incarcerated at approximately six times the rate of Caucasians.”⁷⁰

Similarly, on the day the FSA passed in the House of Representatives, Representative Dan Lungren (R-CA), who “helped to write the Drug Control Act of 1986,” told his colleagues that “one of the sad ironies . . . is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue.”⁷¹ Representative Henry C. Johnson, Jr. (D-GA) urged his colleagues to vote for the FSA because “[t]here is

⁶⁸ 156 Cong. Rec. S1680-02, *S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin).

⁶⁹ *Id.* at *S1680-81.

⁷⁰ 157 Cong. Rec. S4209-02, *S4209-10 (daily ed. June 29, 2011) (statement of Sen. Durbin).

⁷¹ 156 Cong. Rec. H6196-01, *H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren).

absolutely no justification for this racial disparity in federal cocaine sentencing policy.”⁷² Speaking in support of the FSA, Representative Sheila Jackson Lee (D-TX) stated, “[i]t is time for us to realize that the only real difference between these two substances is that a disproportionate number of the races flock to one or the other.”⁷³ Representative Steny Hoyer (D-MD) asserted that “[i]t has long been clear that 100-to-1 disparity has had a racial dimension . . . helping to fill our prisons with African Americans disproportionately put behind bars for longer. The 100-to-1 disparity is counterproductive and unjust.”⁷⁴

There can be little doubt that Congress overwhelmingly voted for the FSA in order to redress the profound racial disparities that the 100:1 ratio created. The legislative history confirms that “[i]t is the instinctive distaste against men and women, but

⁷² 156 Cong. Rec. E1498-02, *E1498-99 (daily ed. July 28, 2010) (statement of Rep. Johnson).

⁷³ 156 Cong. Rec. H6196-01, *H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee).

⁷⁴ 156 Cong. Rec. H6196-01, *H6203 (daily ed. July 28, 2010) (statement of Rep. Hoyer); *see also* 156 Cong. Rec. H6196-01, *H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn) (“Equally troubling is the enormous growth in the prison population, especially among minority youth. The current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every 31 Americans is in prison or on parole or on probation, including one in 11 African Americans.”); 156 Cong. Rec. H6196-01, *H6197 (daily ed. July 28, 2010) (statement of Rep. Scott) (“This disparity is particularly egregious when you consider that the Sentencing Commission has concluded that there is no pharmacological difference between the two forms of cocaine, and that 80 percent of the crack defendants are black, whereas only 30 percent of the powder cocaine defendants are black.”).

mainly African-American men . . . languishing in prison for committing crimes of crack rather than powder cocaine, that led Congress to pass the Fair Sentencing Act.” *U.S. v. Holcomb*, 657 F.3d 445, 460-61 (7th Cir. 2011) (Williams, J., dissenting from denial of rehearing en banc).

IV. This Court’s Presumption That Congress Seeks To Avoid Unnecessarily Vindictive Punishments, Along With The Rule Of Lenity, Weigh In Favor Of Applying The New Crack/Powder Ratio To Petitioners.

The principle underlying this Court’s holding in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), weighs in Petitioners’ favor. *Hamm* held that state trespass convictions arising from the petitioners’ participation in lunch counter sit-ins had to be vacated as a result of the subsequent Civil Rights Act. *Id.* at 307, 317. The principle reflected in that holding “takes the . . . form of imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive.” *Id.* at 313. The Court directed that this “general principle . . . is to be read wherever applicable as part of the background against which Congress acts.” *Id.* at 313-14.

The *Hamm* principle is applicable here, where Congress acted against the background of unprecedented opposition to a sentencing policy widely acknowledged to have discriminatory effects. As a result, an intention must be imputed to Congress that the old crack/powder ratio, which “no longer further[s] any legislative purpose,” *id.* at 313,

should not be imposed on any defendant after the FSA's enactment. The purpose of the FSA, like the Civil Rights Act, "was to obliterate the effect of a distressing chapter in our history," *id.* at 315, during which African American citizens of this country were effectively subject to legal discrimination based on their race. Even though the FSA did not "substitute[] a right for a crime," *id.* at 314, this Court's reasoning in *Hamm* applies in the extraordinary context of the new federal cocaine sentencing scheme. When Congress replaces a discriminatory legal regime, there is no justification for gradually tearing down the old regime—rather, the old law must immediately yield to the new law. It would be "unnecessarily vindictive," *id.* at 313, to sentence Petitioners Hill and Dorsey under a 100:1 ratio that science has rejected as unsound and Congress has repudiated as unfair.

Amici perceive no ambiguity in Congress's intent to remedy the racially disparate consequences of the 100:1 ratio when it passed the FSA. However, to the extent that the Court is not persuaded that the "text, structure, and history" of the FSA "unambiguously" establishes this intent, the "rule of lenity" requires the Court to "resolve the ambiguity in [Petitioner Hill and Dorsey's] favor." *U.S. v. Granderson*, 511 U.S. 39, 54 (1994). As this Court recently reiterated, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. U.S.*, 561 U.S. ---, 130 S. Ct. 2896, 2932 (2010) (internal quotation marks omitted). This rule favors applying the FSA to all sentences after its enactment.

To deny Petitioners the benefit of the FSA's less discriminatory ratio would undermine the Act's self-proclaimed objective "[t]o restore fairness to Federal cocaine sentencing."⁷⁵ Congress's pressing concerns with racial equality and proportionality in sentencing apply with equal force to conduct committed prior to the passage of the FSA as to conduct committed afterwards. It would be inconsistent with Congress's purpose to end the legacy of inequitable cocaine sentencing for this Court to allow the defunct and flawed 100:1 ratio to govern any sentence imposed after the FSA's enactment.

⁷⁵ Pub. L. No. 111-220, 124 Stat. 2372 (2010).

CONCLUSION

For the reasons stated above, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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6

APPENDIX

STATEMENTS OF INTEREST

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Illinois is a statewide affiliate of the national ACLU. Since its founding more than 90 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including *Kimbrough v. U.S.*, 552 U.S. 85, 94 (2007), which is pertinent to the issue presented in this case.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that's as good as its ideals, and towards this end, is dedicated to eliminating all forms of discrimination from our criminal justice system. Fairness and equality in the administration of justice is a fundamental civil and human right, but the extreme racial disparities that exist within the criminal justice system deny this right to the most vulnerable segments of society. Since the passage of the Anti-Drug Abuse Act of 1986, courts, legislators, and the United States Sentencing Commission have repeatedly noted the inequity in sentencing for crack

cocaine offenders, who receive harsher and longer prison terms for the same conduct as powder cocaine offenders, which disproportionately affects African Americans. Thus Congress passed the Fair Sentencing Act to remedy this stark disparity in sentencing, noting its intent "to restore fairness to Federal cocaine sentencing." The Leadership Conference supports application of the Fair Sentencing Act to all defendants whose conduct predates the enactment of the Fair Sentencing Act, but were sentenced after.

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership corporation incorporated in the State of New York in 1909. The NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of all persons and to eliminate racial hatred and racial discrimination. The NAACP has been at the forefront of the struggle to end racial disparities in the criminal justice system.

The Sentencing Project is a national non-profit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project has produced a broad range of scholarship assessing the effects of federal crack cocaine policy, and members of its staff have been invited to present testimony before Congress, the United States Sentencing Commission, and professional audiences on the topic. Because of its particular expertise and interest in this issue, The Sentencing Project also filed a brief *amici curiae* (jointly with the Center for the Study of Race and

Law at the University of Virginia School of Law) specifically addressing the crack-powder cocaine disparity in *Kimbrough v. United States* (2007).

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals whose lives have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM, whose membership includes many prisoners previously sentenced under the now repudiated crack cocaine sentencing structure, worked since the early 1990s to reform the law. Today, FAMM membership includes dozens of individuals sentenced since the Fair Sentencing Act was enacted to pre-FSA mandatory minimum sentences. They include Mario Anthony Herrera, sentenced at the age of 19 in the Southern District of Iowa on September 24, 2010 for his role in distributing 13.4 grams of crack cocaine. The judge departed from the pre-Amendment guideline range of 70-87 months but could not reduce Herrera's sentence further due to the five year mandatory minimum. Herrera suffered significant substance abuse problems as a youth and had a very tough childhood that included absent and incarcerated parents and membership in a youth gang. But, following his release from the state training school, he voluntarily left the gang and engaged in a committed relationship with the mother of his son,

whose birth forced him to grow up. Herrera's son was 23 months old when Herrera was incarcerated. If petitioners prevail, Herrera's sentence can be corrected to a just and fair term.

The Open Society Institute is a part of the Open Society Foundations, which work to improve the lives of the world's most vulnerable people and to promote human rights, justice, and accountability. To achieve this mission, the Foundations seek to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. In the United States, the Open Society Foundations implement a range of initiatives to advance justice, education, public health, and independent media. At the same time, the Foundations build alliances across borders and continents on issues such as corruption and freedom of information. The Foundations place a high priority on protecting and improving the lives of people in marginalized communities. The Washington, D.C. Office of the Open Society Institute supports fair and responsible criminal justice policies in the United States. In furtherance of this aim and our goal of eliminating racial disparities and securing a fair and equitable system of justice, the Washington Office has long worked to heighten public discourse on the unwarranted disparity between crack and powder cocaine sentencing, and has played a pivotal role in raising awareness of the issue before the U.S. Sentencing Commission, the U.S. Congress, and the Executive Branch.

The Drug Policy Alliance ("the Alliance") is the nation's leading advocacy organization dedicated

to broadening the public debate over drug use and regulation and to advancing pragmatic drug laws and policies, grounded in fairness, equality, public health and respect for civil and human rights. The Alliance is a non-profit, non-partisan organization with more than 30,000 members and active supporters nationwide. The Alliance has actively taken part in cases in state and federal courts across the country in an effort to reduce the disparate impact of the nation's drug laws and was an active supporter of the Fair Sentencing Act of 2010.

StoptheDrugWar.org is an organization devoted to reform of drug policy through the establishment of new approaches that are not based on criminalization. Since its founding 18 years ago, StoptheDrugWar.org has reached millions of people through educational programs that highlight the harms, injustices and failures of current drug policies, including mandatory and disproportionate sentencing; and through grassroots and coalition advocacy in Congress.

**AMICUS
CURIAE
BRIEF**

In the
Supreme Court of the United States

EDWARD DORSEY, SR.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

COREY A. HILL,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**On Writs of Certiorari to the United States
Court of Appeals for the Seventh Circuit**

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INTEREST OF AMICUS CURIAE¹

Amicus curiae the Center on the Administration of Criminal Law, New York University School of Law (the “Center”)² is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formation of public policy. The Center’s litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases.

Following the enactment of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (“the ADAA”), federal offenses involving specific quantities of drugs were subject to mandatory minimum sentences. The ADAA created a vast sentencing disparity between crack and powder cocaine, “treat[ing] every gram of crack cocaine as the equivalent of 100 grams of powder cocaine.” *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). As Petitioners and the United States explain, Congress amended this “100-to-1 ratio” in the Fair

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represent that they authored this brief in its entirety and that none of the other parties or their counsel, or any person or entity other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*’s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

² New York University School of Law (“the Law School”) is named here solely to identify the Center’s affiliation. The views expressed in this brief should not be regarded as the position of the Law School.

Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (“the FSA”) with the express intent to apply the amendment to all pending cases. The Center’s brief supports this argument by demonstrating that the 100-to-1 ratio lacked any evidentiary basis at the time Congress enacted it, and that 26 years of subsequent empirical data conclusively refute the purported justifications for that ratio. It would be manifestly unjust, and Congress could not possibly have intended, to apply the old, discredited ratio to *any* defendant.

SUMMARY OF ARGUMENT

Under the ADAA’s 100-to-1 ratio, five grams or more of cocaine base (the most common form of which is crack) was “penalized as severely as 100 times that amount” of powder cocaine. *DePierre v. United States*, 131 S. Ct. 2225, 2229 (2011). For example, although 500 grams or more of powder cocaine (cocaine hydrochloride) triggered the ADAA’s five-year mandatory minimum, only five grams of crack cocaine triggered the same penalty. 21 U.S.C. § 841(b)(1)(B)(ii) (2006); *id.* § 841(b)(1)(B)(iii). The ADAA’s legislative history reflects that Congress rushed to impose this grossly disparate sentencing regime because it wanted to target major drug traffickers, feared that crack caused more violence and other harms to society than powder cocaine, and believed that crack was unusually dangerous and addictive. Yet because the crack phenomenon was still new and poorly understood at the time, Congress had no empirical data or research to support these assumptions, let alone the choice of a 100-to-1 ratio. By all accounts, that figure was

plucked from thin air to make a political point that Congress was "serious" about crimes involving crack.

Moreover, in the 26 years following Congress's rush to judgment in enacting the ADAA, a vast amount of research, evidence, and criminal justice experience conclusively undermines the purported justifications for the old ratio. In particular, the data demonstrate that:

- The ADAA's ratio did not lead to increased punishment of major crack traffickers. To the contrary, the ratio, together with the statute's low crack-quantity trigger for mandatory minimums, led to markedly increased prosecutions of small-time street dealers, whose sentences were comparable to or even greater than those of much higher-level distributors of powder cocaine.
- Crack does not impose 100 times more harm upon society than powder cocaine. For example, in the past 15 years, there has been no significant difference between the social harms caused by crack and those caused by powder cocaine. Federal offenses for both types of the drug have been linked to violence in only a modest fraction of cases. Moreover, the ADAA regime has itself caused harm, by promoting a stark racial disparity in conviction and incarceration, and systematically over-punishing low-level defendants.
- Crack is not demonstrably more dangerous to the user than powder cocaine. The two chemicals have equally deleterious health effects and rates of addiction.

In light of this evidence, Congress determined that a substantial reduction of the crack-powder ratio was necessary “[t]o restore fairness to Federal cocaine sentencing.” FSA pml., 124 Stat. at 2372. Having made that determination, Congress could not have concluded that the 100-to-1 ratio it expressly repudiated could still be imposed on pipeline defendants. Indeed, given the bankrupt justifications for the old ratio, and the pervasive harms and injustice it has caused, it would be manifestly unfair to continue to apply that ratio to *any* defendant.

Finally, the federal criminal justice system’s prior experience teaches that a limited application of the FSA to pipeline defendants will present no administrative hardship.

ARGUMENT

I. CONGRESS ADOPTED THE ADAA CRACK PROVISIONS IN UNDUE HASTE AND WITHOUT EMPIRICAL SUPPORT

Congress enacted the mandatory minimum crack provisions without adequate time to properly consider the implications of creating such a wide gulf between the punishment of crack and the punishment of powder cocaine. In fact, the legislative record reveals a breakdown of the deliberative process, leading to the imposition of an arbitrary and unduly punitive 100-to-1 ratio simply to make a political point that Congress was taking the crack problem seriously. Moreover, the legislative record shows that Congress’s stated goals for imposing extraordinary penalties upon crack defendants were not supported by any empirical evidence.

1. The ADAA went from initial proposal to enactment in just four months. The first bill was proposed in late June 1986, following media accounts of a rising crack epidemic. David A. Sklansky, *Essay, Cocaine, Race, and Equal Protection*, 47 Stan L. Rev. 1283, 1293-94 (1995). Then, over the Fourth of July recess, constituent outrage flared over the cocaine-related deaths of two sports stars. U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 117, 122-23 (1995) ("1995 Report"); and see, e.g., 132 Cong. Rec. 19,249 (1986) (Sen. Leahy) ("The country was shaken recently when cocaine killed two talented young athletes—Len Bias of the University of Maryland and Don Rogers of the Cleveland Browns."); *id.* at 22,660 (Rep. Michel) ("The death of basketball star Len Bias shocked us into action.").³ Party leadership quickly exerted pressure to pass "comprehensive drug legislation" by fall midterm elections. Sklansky, *supra*, at 1294 n.55. The ADAA was enacted October 27, 1986. 100 Stat. at 3207.

Eric Sterling, then counsel for the House Judiciary Committee, later testified that "the intensity of the climate of legislative haste," including an extraordinary five-week deadline for committee work, caused "[t]he careful deliberative practices of the Congress" to be "set aside." U.S. Sentencing Comm'n, *Public Hearing on Proposed Guideline Amendments* (Mar. 22, 1993) (written testimony of Eric E. Sterling) ("Sterling Testimony")

³ Contemporaneous media reports erroneously linked Bias's death to crack; he had in fact used powder cocaine. 1995 Report 122-23.

at 1-2. available at <http://www.srcc-project.org/resources/ussc-materials/testimony/written-testimony-for-public-hearing-on-proposed-guideline-amendments-mar-22-1993/>. The bill's supporters admitted as much at the time. One Senator "[v]ery candidly" observed that "none of us has had an adequate opportunity to study" the bill because "[i]t did not emerge from the crucible of the committee process, tempered by the heat of debate." 132 Cong. Rec. 26,462 (1986) (remarks of Sen. Mathias). Senator Dole conceded it was "probably correct" that Congress was "rushing a judgment on the drug bill." *Id.* at 26,434. And another member went so far as to compare "the sanctimonious election stampede of the House of Representatives" to "a congressional lynch mob." *Id.* at 26,441 (Sen. Evans).

2. The Congressional Record contains no empirical justification for the 100-to-1 ratio.⁴ Indeed, the floor statements do not address that figure at all. 1995 Report 117. Nor was the 100-to-1 ratio discussed at the single four-hour Senate hearing dedicated to the crack issue. "Although the 1986 Congressional hearing with respect to crack cocaine . . . was filled with general statements about the dangers of crack and the economics of crack distribution, Congress had no hard evidence before it to support the contention that crack is 100 times

⁴ Because the committee process for the ADAA was curtailed, "[t]he only record of congressional intent is contained in the statements made on the floors of the House and Senate in favor of the Act." William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252 (1996).

more potent or dangerous than powder cocaine.” *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring).⁵ To the contrary, Sterling admitted that, in the rushed atmosphere that summer, numbers were simply plucked from thin air. For example, the 50-to-1 ratio proposed in an earlier version of the bill “was arbitrarily doubled” in the final act “simply to symbolize redoubled congressional seriousness;” it “reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug.” Sterling Testimony 4, 6.

3. The legislative record does reflect that Congress had three general justifications for being especially tough when it came to crack quantities:

- *First*, the goal of the ADAA was to target “major drug traffickers.” *Kimbrough*, 552 U.S. at 98. After “consulting with law enforcement professionals but without holding hearings,” Congress believed the low quantities triggering mandatory minimum penalties “generally would be associated with major and serious traffickers” in crack. 1995 Report

⁵ Moreover, during the single brief discussion of mandatory minimum sentences, one law enforcement witness could not “honestly answer” whether the penalties would deter crime, and the other recommended a one-year mandatory term of imprisonment—far lower than the provisions that ultimately became law. “Crack” Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs, 99th Cong. 65 (1986) (testimony of Deputy Inspector Martin Boyle, New York Policy Department); *id.* (testimony of Sheriff James Adams, Sumter County, Florida).

120-21 (citing floor statements and subcommittee work on a prior bill).

- *Second*, unnamed reports were cited attributing crack to unusually high levels of violence and other social harms. For example, one Member of Congress alleged that “crack use” had “engendered increased crime in several cities” because “[u]sers become so deranged from its psychotic effects that they may perpetrate brutal crimes.” 132 Cong. Rec. 22,991 (1986) (Rep. Dorgan); *see also* 1995 Report 180-81 (“[M]embers perceived crack cocaine to be ‘[c]ausing crime to go up at a tremendously increased rate....’” (citation omitted)).
- *Third*, Congress thought crack required special treatment “because of the especially lethal characteristics of this form of cocaine.” 132 Cong. Rec. 26,447 (1986) (Sen. Chiles); *see also*, e.g., *id.* at 22,993 (1986) (Rep. LaFalce) (“Crack is thought to be even more highly addictive than other forms of cocaine or heroin.”).

But it clear from the legislative record that Congress based these conclusions on isolated anecdotes, and had no empirical data to support these justifications. That is perhaps unsurprising because the crack phenomenon was still new in 1986. Marcia R. Chaiken, U.S. Dep’t of Justice, Nat'l Inst. of Justice, *Identifying and Responding to New Forms of Drug Abuse: Lessons Learned from “Crack” and “Ice”* 33 (1993). Accordingly:

- The “drug enforcement experts” who provided Congress with information about appropriate

crack quantities were largely working in the dark on a market that "was just emerging." U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 4-5 (1997) ("1997 Report").

- As late as 1995 there were still only a "handful" of localized, contradictory studies on the correlation between cocaine and crime. 1995 Report 94-97, 106-07. One suggested that "the current focus on crack-related violence may be more the result of a media event than an emergent trend." *Id.* at 97 (citation omitted).
- One medical expert who testified at the Senate hearing conceded that researchers had yet to "find out the results of cocaine use . . . [or] the basic mechanisms of addiction." *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 21 (1986) (statement of Dr. Robert Byck, Professor of Psychiatry and Pharmacology, Yale University School of Medicine). Even by 1990 "[r]elatively little ha[d] been published describing the human pharmacology of cocaine smoking under controlled or semicontrolled laboratory conditions." Reese T. Jones, *The Pharmacology of Cocaine Smoking in Humans*, in *National Institute on Drug Abuse Research Monograph No. 99: Research Findings on Smoking of Abused Substances* 30, 32 (C. Nora Chiang & Richard L. Hawks eds., 1990) (citations omitted).

Put simply, Congress's general decision to punish crack more harshly than powder cocaine had no more evidentiary basis than its specific decision to use the 100-to-1 ratio to implement that policy objective. That is reason enough to reject any further imposition of the ratio against any defendant.

II. SUBSEQUENT EMPIRICAL DATA CONCLUSIVELY UNDERMINE THE JUSTIFICATIONS FOR THE OLD RATIO

Following Congress's passage of the AADA in 1986, every expert of whom we are aware who considered the 100-to-1 ratio concluded that it could not be justified and needed to be substantially reduced. The most prominent example is the Sentencing Commission, which considered and rejected the ratio in 1995, 1997, 2002, and 2007. 1995 Report 195-98; 1997 Report 9; U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 104 (2002) ("2002 Report"); U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (2007) ("2007 Report"). Numerous federal judges,⁶

⁶ See, e.g., Letter from Judge John S. Martin, Jr. and 26 other judges of the United States Circuit Courts of Appeals and District Courts to Senator Orrin Hatch, Chairman of the Senate Judiciary Comm., and Congressman Henry Hyde, Chairman of the House Judiciary Comin. (Sept. 16, 1997), reprinted in 10 Fed. Sent'g Rep. 194, 194 (1998) ("It is our strongly held view that the current disparity between powder cocaine and crack cocaine . . . can not be justified and results in sentences that are unjust and do not serve society's interest."); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995); *United States v. Ricks*, 494 F.3d 394, 400 (3d Cir. 2007); *United States*

commentators,⁷ and various organizations reached the same conclusion.⁸ Most notably, of course,

v. Washington, 127 F.3d 510, 518 (6th Cir. 1997) (Jones, J., concurring in part and dissenting in part); *Willis*, 967 F.2d at 1226 (Heaney, J., concurring); *United States v. Pruitt*, 502 F.3d 1154, 1171 n.2 (10th Cir. 2007) (McConnell, J., concurring); *United States v. Williams*, 472 F.3d 835, 845 n.4 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc); *United States v. Williams*, 481 F. Supp. 2d 1298, 1301-02 & n.5 (M.D. Fla. 2007); *United States v. Walls*, 841 F. Supp. 2d 24, 31 (D.D.C. 1994); *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243, at *4-5 (E.D. Tenn. May 6, 2005); *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005); *United States v. Fisher*, 451 F. Supp. 2d 553, 559 (S.D.N.Y. 2005); *United States v. Smith*, 359 F. Supp. 2d 771, 780-81 (E.D. Wis. 2005); and *cf.* *Minnesota v. Russell*, 477 N.W.2d 886, 888 (1991).

⁷ See, e.g., William J. Stuntz, *Race, Class, and Drugs*, 98 Colum. L. Rev. 1795, 1835 (1998); Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time To Restore the Balance*, 16 Fed. Sent'g Rep. 87, 87 (2003); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. Rev. 1751, 1787 (1999); Spade, Jr., *supra* n.4, at 1238, 1287-88; Sklansky, *supra*, at 1288-89.

⁸ See, e.g., Letter from Hon. Paul Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to Hon. Richardo H. Hinojosa, Chair, United States Sentencing Commission (Nov. 2, 2007) (reiterating opposition of the Judicial Conference to "the existing sentencing difference between crack and powder sentences"); Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Rep. Bobby Scott, Chairman, and Rep. Randy Forbes, Ranking Member, Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary (July 3, 2007), available at http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf (describing ABA's longstanding judgment "that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders"); Barbara R. Arnwine et al., Open Letter to the United States

Congress itself repudiated the 100-to-1 ratio in the FSA in order to restore basic fairness to federal cocaine sentencing.

Unlike Congress's original passage of the ADAA, this unanimity of opinion is based on a considerable body of data and experience gathered over the last 26 years. As we demonstrate below, that data and real-world experience conclusively undermine the original, purported justifications for the now-discredited 100-to-1 ratio. In fact, it is now beyond serious dispute that the old ratio failed to accomplish, and in numerous respects critically undermined, its intended purposes. For these reasons, it is clearer now than ever before that *any* imposition of the 100-to-1 ratio would be manifestly unjust, and that Congress could not have intended to allow such unfair sentences to be imposed after passage of the FSA.

A. The 100-to-1 Penalty Ratio Failed To Prioritize Federal Prosecutions Of Major Cocaine Traffickers

The principal goal of the ADAA's mandatory sentencing scheme was to "create the proper incentives for the Department of Justice to direct its 'most intense focus' on 'major traffickers' and 'serious traffickers.'" 1995 Report 119 (citing committee report on "an earlier version of the bill"); *see also* 132 Cong. Rec. S14,301 (Sen. Robert Byrd) (daily ed. Sept. 30, 1986) (the goal of the mandatory minimum

Congress. Open Society Policy Center (Oct. 2, 2007), <http://opensocietypolicycenter.org/wp-content/uploads/Open-Letter-on-Crack-Reform.pdf> (letter from over 50 civic and religious leaders urging Congress to eliminate the unwarranted crack sentencing disparity).

structure generally was to impose ten years' imprisonment upon "the kingpins—the masterminds who are really running these operations," and five upon "middle-level dealers"). But the 100-to-1 ratio, together with the low quantities that triggered mandatory minimums for crack cocaine under the ADAA, did just the opposite. They effectively guaranteed that the focus of federal law enforcement would be on street-level dealers, who could and would be punished as much, or even more, than cocaine kingpins.

As noted above, when Congress enacted the ADAA, it believed that the low crack-quantity levels triggering mandatory minimums were consistent with its overall goal of targeting crack traffickers. But this belief—which was not based on any actual evidence—proved to be seriously mistaken. Contrary to Congress's stated objective, the lowest crack-quantity level targets "retail or street-level dealer[s]." 1997 Report 5. And when the 100-to-1 ratio was applied against those low-level dealers, they were subject to the same penalties as those Congress intended for "serious traffickers who deserve the five-year statutory penalty." *Id.* In other words, the ADAA enacted an absurd penalty structure under which crack defendants playing minor roles could be punished as or even more severely than the powder-cocaine traffickers ultimately responsible for the crack that the street-level defendants sold. See 1995 Report 67-68.

Moreover, what federal law enforcement actually focused on was the exact opposite of what the ADAA intended: imprisoning low-level participants in the crack trade. A consistent majority of federal crack defendants have been street-level dealers or even

lower-level players, including crack *users*. 2007 Report 19 & fig. 2-4 (summarizing 2005 data reflecting that more than 60% of crack cocaine defendants were street-level dealers, couriers, low-level assistants, or users); *id.* at 21 fig. 2-6 (summarizing 2000 data reflecting that 66.5% of federal crack defendants were street-level dealers, and over 6% more were couriers, low-level assistants, or users); 1995 Report 158 ("The majority of crack defendants... are street-level."). And in 2005 street-level dealers of crack were serving an average of 97 months in prison, nearly *20 months longer on average* than the wholesaler who supplied the powder that the street dealer cooked into crack. 2007 Report 30 fig. 2-14. Indeed, the penalties imposed on street-level crack dealers and crack *couriers* historically *exceeded* those of the *highest-level importers*—the kingpins—of powder cocaine. See 2002 Report 43 fig. 9 (104 month average sentence for street-level dealer, 107 month average for couriers, but 101 month average for highest-level powder trafficker). Moreover, as one might expect, the vast majority of such low-level crimes were confined within a neighborhood or were similarly local, 2007 Report 22 fig. 2-7, meaning that federal resources were being diverted away from national and international crimes to the traditional jurisdiction of local law enforcement.⁹

⁹ Indeed, as differential penalties for crack over powder disappeared in the state system, see 2007 Report 98-99, the outlier federal scheme became the preferred jurisdiction for prosecution of crack offenses in this country. See Marc Mauer & Ryan King, *The Sentencing Project, A 25 Year Quagmire: The War on Drugs and Its Impact on American Society* 8 (2007)

By contrast, federal prosecutions of Congress's highest-level intended targets (importers, high-level suppliers, manufacturers, organizers, etc.) have remained stubbornly infrequent. *Id.* at 20-21 figs. 2-5, 2-6 (less than 13% of powder offenders and less than 9% of crack offenders in 2005, and even smaller numbers in 2000). And in 2005, even the largest category of traffickers above the street level (the "wholesalers") still only represented about one in five crack defendants overall. *Id.* This persistent focus on low-level offenders is not only directly contrary to Congress's stated policy objective, it is extremely inefficient.¹⁰

Finally, the 100-to-1 ratio presented perverse incentives leading to prosecutions that had nothing to do with deterring crack trafficking. In particular, because of the widely disparate penalties for crack

(attributing "a rise of 144%" in the number of federal drug prosecutions "in the period of 1985-2002" to increasing numbers of state-case transfers "in order for the defendant to face stiffer penalties in the federal system"); *accord* 2007 Report 107 n.173.

¹⁰ Jonathan P. Caulkins et al., RAND Corp., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* xxii-xxiii (1997) ("[M]andatory minimums would be the most cost-effective alternative [as compared to conventional enforcement and treatment] only . . . at dollar values [that] would typify only those dealers at a fairly high level in the cocaine trade and who are unusually difficult to arrest."); see also Anne Morrison Piehl & John J. Dilulio, Jr., "*Does Prison Pay? Revisited*, The Brookings Rev., Winter 1995, at 25 (concluding from prisoner survey data that the "number of drug sales prevented by incarcerating a drug dealer" for a non-violent drug crime is "zero," and therefore valuing "drug crimes (sales and possession) at zero social cost" and citing other analysts as reaching "similar conclusions").

cocaine, the government went so far as to fabricate crack cases targeted at dealers who would otherwise sell powder cocaine, simply to increase the chances that the powder-cocaine defendant might plead guilty. For example, law enforcement officers would direct informants and undercover agents to insist upon delivery of crack even when the target had historically dealt only in powder. E.g., *United States v. Fontes*, 415 F.3d 174, 177-79 (1st Cir. 2005); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine. Had the government decided to purchase powder cocaine (consistent with [defendant's] prior drug sales), the base criminal offense level would have been only 14 . . ." (footnote omitted)).¹¹

B. Crack Is Not 100 Times More Harmful To Society Than Powder Cocaine

As discussed above, the ADAA's enhanced penalties for crack were partly motivated by fear that crack, more than other drugs, "engendered increased crime." 132 Cong. Rec. 22,991 (1986) (Rep. Dorgan). Although Congress had no evidence to support this fear at the time, it is now clear that crack is not significantly more harmful to society than powder cocaine, and certainly not anything close to 100 times more harmful. In fact, the current view is that the ADAA *itself* causes substantial harm to society.

¹¹ *Williams* was vacated and remanded on appeal. 456 F.3d 1353 (11th Cir. 2006), in a decision abrogated by *Kimbrough*.

1. There is some evidence that societal harms increased in the mid-1980s, at the same time crack became broadly available to the market.¹² But by the early 1990s the spike in crimes was over, even though rates of crack use remained constant. Roland G. Fryer, Jr. et al., *Measuring The Impact Of Crack Cocaine* 3-4, 27 (Nat'l Bureau of Econ. Research, Working Paper 11318, 2005). available at <http://www.nber.org/papers/w11318> ("By the early 1990s . . . the relationship between crack and unwelcome social outcomes had largely disappeared. Thus, though crack use persisted at high levels, it did so with relatively minor measurable social consequences."). Moreover, it turns out that the increased violence of concern to the ADAA Congress was not "engendered" by crack after all. Rather, that spike in violence, and the subsequent dip in the 1990s while crack use remained constant, were attributable to the newness of the crack market in the mid-1980s. See, e.g., 2007 Report 86 & n.129; 1995 Report 96. In any event, it is clear that that early violence has now dissipated.

2. Over the last 15 years, there has been no significant difference between the social harms once associated with crack and those associated with powder cocaine.¹³ It is now quite rare for crack or powder-cocaine offenses to be associated with

¹² See, e.g.. Blumstein, *supra* n.7, at 88-89.

¹³ This is not to suggest that there was no social cost to crack's entry into poor communities. But all drugs impose social costs. That is true for crack sold in poor communities and for powder cocaine sold in wealthier communities, although the wealthy have resources that allow them to mitigate the injuries. See Stuntz, *supra* n.7, at 1815.

"violent conduct," and to the modest extent such an association exists,¹⁴ there is no statistically significant difference between powder cocaine and crack. See 2007 Report 37 & fig. 2-19 (in 2005, only 6.2% of powder cases and 10.4% of crack cases involved "violent conduct;" in 2000, 9.0% of powder cases and 11.6% of crack cases did); 2002 Report 57 fig. 19 (summarizing data reflecting homicide in 3.4% of both crack and cocaine cases). This evidence calls into question the legitimacy of any sentencing disparity between crack and powder cocaine based on the supposed risk of societal harms caused by crack, and certainly the extreme 100-to-1 disparity.

3. In fact, it is now well understood that the ADAA's exceptionally harsh treatment of crack offenses *itself* imposed social harm, for two reasons:

First, as *amici curiae* the American Civil Liberties Union ("ACLU") and other organizations explain, Congress has now embraced the widely held view that the 100-to-1 ratio has contributed to the unjustifiably disproportionate prosecution and incarceration of African Americans in this country. This unjust regime is extremely harmful to the lives of those citizens and society generally. "[A] broad array of recent empirical studies" suggests that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves." Donald Braman, *Punishment and Accountability: Understanding and Reforming*

¹⁴ The most recent empirical review shows that approximately 90% of federal powder and crack offenses involve *no violence by any party*. 2007 Report 38 fig. 2-20 (2005 data).

Criminal Sanctions in America, 53 UCLA L. Rev. 1143, 1165 (2006).

Second, it is unjust to impose a massive sentence upon low-level crack defendants *solely* because of social harms they themselves are not directly responsible for. Yet for the crimes proscribed by the ADAA, crack quantity—the alleged proxy for those social harms—is the overriding determinant of the defendant's sentence, whether or not he has committed violence or engaged in other acts that could harm other people. Cf. Jon O. Newman, *The New Commission's Opportunity*, 10 Fed. Sent'g Rep. 44, 44 (1995) ("[W]ith respect to narcotics offenses...there is no good reason to make drug quantity the overriding determinant of punishment.... A better system would recognize that role in the offense is a far more significant measure of culpability than quantity.").

C. Crack Is Not 100 Times More Harmful To An Individual User Than Powder Cocaine

The 100-to-1 ratio vastly overstates the alleged pharmacological differences between crack and powder cocaine that Congress invoked in enacting the ADAA. As *amicus curiae* the ACLU explains,

- Crack and powder cocaine "have the same active ingredient and produce the same physiological and psychotropic effects." *DePierre*, 131 S. Ct. at 2228; *see also Kimbrough*, 552 U.S. at 94 (same).
- Exposure to crack and powder cocaine *in utero* also produces similar effects, and few, if any, long-term effects (after controlling for exposure to independent factors, like alcohol

and tobacco). See 2007 Report 68-69; Barry Zuckerman et al., *Cocaine Exposed Infants and Developmental Outcomes: "Crack Kids" Revisited*, 287 J. Am. Med. Ass'n 1990, 1990-91 (2002).

- The risk of cocaine dependence is similarly high among both crack cocaine smokers and those who inject cocaine hydrochloride. See Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 279 J. Am. Med. Ass'n 1580, 1582-83 (1996).

Thus, in the long run, crack and powder cocaine have substantially equivalent effects upon the user. See *id.* at 1581.

Although smoking cocaine (the typical administration of crack) may present more risk of addiction than insufflating (*i.e.*, snorting) cocaine (the typical administration of powder), the 100-to-1 ratio is based on the chemical form of cocaine, not how it is administered. As a result, the ratio guarantees unjust sentences. For example, a small-time dealer caught with, say, 50 grams of powder cocaine who supplies intravenous users does not receive a mandatory minimum sentence, whereas a small-time dealer in crack caught with the same amount would receive a ten-year mandatory minimum sentence, even though the harm to the users is the same.¹⁵

¹⁵ Over 12% of the population of powder cocaine users inject the drug, by one estimate. See Dept of Health & Human Servs., *Treatment Episode Data Set (TEDS) 1993-2003: National*

III. CORRECTING THE ERRONEOUS POST-FSA SENTENCES WILL NOT BURDEN THE FEDERAL CRIMINAL JUSTICE SYSTEM

Applying the FSA's provisions to defendants sentenced on or after August 3, 2010 will require new sentencing proceedings for a proportion of the pipeline defendants. The exact number is unclear; it might reach the thousands, but it is certainly substantially fewer than 5,000. *See Frequently Asked Questions: The Fair Sentencing Act of 2010, S.1789 Federal Crack Reform Bill*, Families Against Mandatory Minimums 3 (Aug. 3, 2011), <http://www.famm.org/Repository/Files/FSA%20FAQ%208.3.11.pdf> (estimating that approximately 3,800 pipeline defendants had been sentenced to mandatory minimums in the year following the FSA's enactment); U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 205-06* (2011) (3,905 crack defendants were convicted in fiscal year 2010 of offenses subject to a mandatory minimum; only 64% of those remained subject to a mandatory minimum at sentencing). A concern that these proceedings would somehow unduly tax the federal judiciary cannot justify perpetuating a sentencing regime that should have ended on August 2, 2010, as Congress intended. Cf. *United States v. Booker*, 543 U.S. 220, 244 (2005). But, in any case, recent experience has shown that this concern is unwarranted.

Admissions to Substance Abuse Treatment Services tbl. 3.4 (Nov. 2005), available at http://wwwdasis.samhsa.gov/teds03/teds_03_tbl3.4.htm.

The federal criminal justice community can efficiently and effectively manage a temporary increase in cases requiring similar review. Indeed, since the 2007 Guideline amendment that retroactively lowered the base offense level applicable for crack offenses, federal courts have received more than 25,000 requests for sentence reductions pursuant to 18 U.S.C. § 3582(c) and granted more than 16,000 of them. Sentencing Guidelines for the United States Courts, 76 Fed. Reg. 41,332, 41,333-34 (July 13, 2011). Speaking on behalf of the Criminal Law Committee of the Judicial Conference of the United States, Judge Walton remarked that "this workload was managed surprisingly well."¹⁶ Information systems and operating procedures were put in place.¹⁷ The courts, probation departments, prosecutors, and defense attorneys collaborated to identify, prioritize, and process cases.¹⁸ The Bureau of Prisons expanded inmate access to legal resources and

¹⁶ *Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment*, U.S. Sentencing Comm'n (June 1, 2011), at 3, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Reggie_Walton.pdf.

¹⁷ *Id.*

¹⁸ See, e.g., *Testimony of James E. Felman on behalf of the Am. Bar Ass'n before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010*, U.S. Sentencing Comm'n (June 1, 2011), at 4, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_ABA_James_Felman.pdf.

created systems to ensure new sentences were implemented "rapidly and accurately."¹⁹ The end result, in the words of Judge Castillo, a former member of the Sentencing Commission, was the "greatest untold success story" in federal sentencing. *Transcript of Hearing Before the U.S. Sentencing Comm'n, New York, N.Y. (July 9, 2009)*, at 204 (statement of Judge Ruben Castillo), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf.

This experience created valuable institutional knowledge that can be used in future instances of Guideline retroactivity, or, as in this case, the retroactivity of a statutory penalty scheme. And unlike a case of Guideline retroactivity, which can implicate cases decided decades ago,²⁰ new sentencing proceedings for pipeline defendants will only implicate recently concluded cases. The same judge, prosecutor, defense counsel, and probation officer will be available in many instances. Factfinding essential to the sentencing will, in all likelihood, have already occurred. There is therefore every reason to conclude that it will be seamless and

¹⁹ Statement of Thomas R. Kane, Acting Director, Federal Bureau of Prisons, Before the U.S. Sentencing Commission Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implement the Fair Sentencing Act of 2010, U.S. Sentencing Comm'n 2 (June 1, 2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Thomas_Kane.pdf.

²⁰ U.S. Sentencing Comm'n, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* 4 (2007).

swift to correct the erroneous sentences received by some pipeline defendants.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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BRIEF**

RECORD
AND
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IN THE

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v.

UNITED STATES OF AMERICA,

Respondent.

COREY A. HILL,

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On Writs Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENTS BELOW

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QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which raised the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b)(1), applies retroactively to defendants whose criminal conduct occurred before the effective date of the Act, but who are sentenced after that date.

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**BRIEF OF THE
COURT-APPOINTED *AMICUS CURIAE*
IN SUPPORT OF THE JUDGMENTS BELOW**

INTEREST OF *AMICUS CURIAE*

This brief is submitted in response to the Court's order inviting Miguel A. Estrada to brief and argue these cases as *amicus curiae* in support of the judgments below.

STATUTORY PROVISIONS INVOLVED

The general saving statute, 1 U.S.C. § 109, provides in relevant part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, is reproduced in the appendix to the government's brief (at 5a-12a).

STATEMENT

Petitioners Hill and Dorsey committed crack-cocaine offenses and were convicted, but not sentenced, before the enactment of the Fair Sentencing Act of 2010 ("FSA"), Pub. L. No. 111-220, 124 Stat. 2372, which raised the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b)(1). Both of them were sentenced in accordance with the law at the time of their

offenses, and the pre-FSA mandatory minimums for crack-cocaine offenses dictated their sentences.

The government sought and obtained these mandatory-minimum sentences, and it successfully defended them on appeal to the Seventh Circuit. The government's position was required by the Department of Justice, which had advised prosecutors "[i]mmediately following the enactment" of the FSA that the "new penalties would apply prospectively only to *offense conduct* occurring on or after the [FSA's] effective date." U.S. Br. 2a. Agreeing with the government, the Seventh Circuit reasoned that the general saving statute precludes retroactive application of the FSA to release criminal punishments incurred under prior law, *see* 1 U.S.C. § 109, and that nothing in the FSA provides a contrary indication.

After Hill filed his petition for a writ of certiorari, and shortly before the filing of Dorsey's petition, the Attorney General announced an abrupt change in the government's position. According to the new position, the FSA should apply to sentencing proceedings on or after the FSA's effective date, but not to any pre-existing sentences, including those still pending on direct review. U.S. Br. 3a. The Seventh Circuit declined, however, to reconsider its precedent following this switch. *See United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

A. STATUTORY BACKGROUND

At common law, "the offenses committed before" the repeal of a criminal statute were "discharged by such repeal," and could not "be proceeded upon after such repeal, unless a specific clause in the act of repeal be made enabling such proceedings after the repeal." 1 Matthew Hale, *Historia Placitorum Coronae* 291 (1847 ed.) (1736); *see also*, e.g., 1 William Haw-

kins, *Treatise of the Pleas of the Crown* 107 (3d ed. 1739) (“If one commit an Offense which is made Felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute.”).

The precise origins of this abatement doctrine are unclear. See Albert Levitt, *Repeal of Penal Statutes and Effect on Pending Prosecutions*, 9 A.B.A. J. 715, 715-16 (1923). But whatever its pedigree, it was quickly and widely adopted in the United States. See, e.g., *United States v. Passmore*, 27 F. Cas. 458, 459 (C.C.D. Pa. 1804) (No. 16,005) (Washington, J.); see also *Bell v. Maryland*, 378 U.S. 226, 231 n.2 (1964) (collecting citations); Levitt, *supra*, at 715 n.5 (same). As this Court explained, “[t]here can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence.” *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871). “By the repeal,” therefore, “the legislative will is expressed that no further proceedings be had under the act repealed.” *Ibid.*

Although some repealing statutes contained clauses that expressly displaced prior law, many others contained no such repealing language. See, e.g., *Norris v. Crocker*, 54 U.S. (13 How.) 429, 438 (1851). Courts therefore looked instead to whether “the two [statutes] are repugnant in any of their provisions,” in which case “the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.” *Tynen*, 78 U.S. (11 Wall.) at 92.

Importantly, courts found the inconsistency required for repeal not only by evaluating the substantive reach of the old and new statutes, but also by comparing differences in the *penalties* they imposed.

“Common-law abatements” thus “resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties.” *Warden v. Marrero*, 417 U.S. 653, 660 (1974); *see also*, e.g., *Bradley v. United States*, 410 U.S. 605, 608 (1973) (“the rule applied even when the penalty was reduced”).

Because the abatement doctrine established only a default rule, it was inapplicable where the legislature provided a saving clause preserving the repealed law for defendants whose conduct had already occurred. *See, e.g.*, 1 Hale, *supra*, at 291. Many legislatures therefore found it advantageous to enact general saving statutes governing future amendments to the criminal law. *See Comment, Today’s Law & Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 127-30 (1972) (collecting examples).

Congress followed suit in 1871, adopting a federal saving statute, *see Act of Feb. 25, 1871, ch. 71, § 4*, 16 Stat. 432, to “abolish” the common-law presumption and reverse the rule that “the repeal of a criminal statute resulted in the abatement of ‘all prosecutions which had not reached final disposition,’ *Marrero*, 417 U.S. at 660 (quoting *Bradley*, 410 U.S. at 607). The saving statute, now codified at 1 U.S.C. § 109, provides that “[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide.” As this Court has noted, the statute’s broad language was designed to “bar application of ameliorative criminal sentencing laws repealing harsher

ones in force at the time of the commission of an offense.” *Marrero*, 417 U.S. at 661.

Against this backdrop, Congress enacted the FSA in 2010. Among other changes, the FSA increases the threshold quantities of crack cocaine necessary to trigger mandatory-minimum sentences and fines under 21 U.S.C. § 841(b)(1), *see* FSA § 2, 124 Stat. 2372, and repeals the previously applicable mandatory-minimum sentence for simple possession of crack cocaine, *id.* § 3, 124 Stat. 2373. At the same time, the FSA increases the amount of fines that may be imposed on the same defendants, *see id.* § 4, 124 Stat. 2372-73, as well as directs the Sentencing Commission to impose other sentencing increases for particular offenders, *id.* §§ 5-7, 124 Stat. 2373-74. The FSA became effective when signed by the President on August 3, 2010.

B. THE PRESENT CONTROVERSIES

1. *Dorsey* (No. 11-5683)

After selling crack cocaine to a government informant on August 6, 2008, Dorsey was arrested and charged with one count of possessing with intent to distribute five or more grams of crack cocaine. Dorsey J.A. 9, 48-49. He pleaded guilty on June 3, 2010. *Id.* at 21. On September 10, 2010, he was sentenced to the applicable pre-FSA mandatory minimum of ten years. *Id.* at 67-68, 80, 85.

On appeal, Dorsey argued that he should instead have been sentenced under the FSA, in which case he would not have faced a mandatory-minimum sentence. In response, the government urged the Seventh Circuit to uphold Dorsey’s sentence. Section 109 “requires Congress to ‘expressly provide’ for retroactive application of an ameliorative penalty provi-

sion in order to avoid the default rule that such a provision does not apply retroactively,” the government argued, but “the FSA does not contain so much as a hint that Congress intended it to apply retroactively.” U.S. *Dorsey* C.A. Br. 14-15 (quoting *United States v. Bell*, 624 F.3d 803, 814 (7th Cir. 2010)). The government maintained that “[t]he controlling date for purposes of savings statute analysis is—and should be—the date of the offense conduct,” *id.* at 19, particularly since “[t]here is no meaningful distinction between defendants sentenced before and after the effective date of the FSA,” *id.* at 18.

The Seventh Circuit affirmed. *Dorsey* Pet. App. A1-A4. The court rejected Dorsey’s contention that the “necessary implication” of the FSA requires that it “be applied retroactively” to defendants sentenced after its effective date. *Id.* at A3. “Given the long-standing debate surrounding, and high-level congressional awareness of, this issue,” the court explained, “we are hesitant to read in by implication anything not obvious in the text of the FSA.” *Id.* at A4.

The Seventh Circuit also emphasized that, “if Congress wanted the FSA” to “apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA.” *Dorsey* Pet. App. 4a. “Given the absence of any direct statement or necessary implication to the contrary,” the court concluded, “the FSA does not apply retroactively,” and “the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing.” *Ibid.*

The Seventh Circuit denied Dorsey’s petition for rehearing en banc. *Dorsey* J.A. 103-15. Judge Wil-

liams, joined by Judge Hamilton, dissented on the ground that, in her view, Congress intended the FSA to extend to all individuals sentenced after its effective date. *Id.* at 107-08, 111.

2. *Hill* (No. 11-5683)

On March 28, 2007, Hill sold 53.3 grams of crack cocaine to a government informant and was subsequently charged with one count of distributing 50 grams or more of crack cocaine. *Hill* J.A. 6, 69. He was convicted by a jury on April 20, 2009. *Id.* at 83. His sentencing did not occur until December 2, 2010, at which time he was sentenced to the applicable pre-FSA mandatory minimum of ten years. *Id.* at 78, 85.¹

On appeal, Hill argued that he should have been sentenced under the FSA, which would have resulted in a mandatory-minimum sentence of five years. The government disagreed. It emphasized that nothing in the FSA required retroactivity with sufficient clarity to displace Section 109: “Congress was not unambiguous about retroactivity in the FSA; it was silent.” *U.S. Hill* C.A. Br. 13 n.5. Thus, the government contended, “[t]he controlling date for the purposes of savings statute analysis is and should be the date of the offense conduct.” *Id.* at 14.

¹ Although Hill was sentenced under 21 U.S.C. § 841(b)(1)(A) for a larger quantity of crack cocaine than Dorsey, who was sentenced under Section 841(b)(1)(B), the applicable mandatory-minimum sentences were the same in light of Dorsey’s prior convictions for felony drug offenses. The quantity-based mandatory minimum for Dorsey was five years, but that sentence was doubled under Section 841(b)(1)(B) because of his prior convictions. Had Dorsey been sentenced under the FSA, no minimum sentence would have applied based on quantity, and thus there would have been nothing to double.

The Seventh Circuit affirmed. Hill Pet. App. A1-A2. Invoking its earlier decision in Dorsey's appeal, the Seventh Circuit concluded that the FSA "does not apply retroactively," and that "the relevant date for determining whether the [FSA] applies is the date of the offense conduct, rather than the date of sentencing." *Id.* at A2.

C. SUBSEQUENT DEVELOPMENTS

On July 15, 2011, after the Seventh Circuit's decisions in *Dorsey* and *Hill*, the Attorney General issued a "Memorandum for All Federal Prosecutors," which changed the government's position on the retroactivity issue. U.S. Br. 1a-4a. The memorandum acknowledged that, "[i]mmediately following the enactment" of the FSA, the Department of Justice had "advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010." *Id.* at 2a. It nonetheless concluded that a different policy was warranted to "restor[el] fairness in cocaine sentencing." *Id.* at 4a.

The Attorney General conceded that "the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment" of the FSA. U.S. Br. 3a. "Congress did not intend," he noted, "that its new statutory penalties would apply retroactively to defendants sentenced prior to August 3." *Ibid.* Based on his view that Congress nonetheless intended the FSA to apply "as expeditiously as possible," however, the Attorney General "concluded that the law requires the application of the [FSA]'s new mandatory minimum sentencing provisions to all sentencing that occur on or after August 3, 2010, regardless of when the offense conduct took place." *Ibid.*

The Attorney General's memorandum was submitted to the Seventh Circuit in several appeals that had been filed by the government with the Solicitor General's authorization, and had subsequently been resolved in the government's favor. *Holcomb*, 657 F.3d at 445 (Easterbrook, C.J., concurring in denial of rehearing). A member of the court called for a vote on whether to rehear the appeals *en banc*, which failed when the judges divided evenly on the question. *See ibid.* (order).

1. Chief Judge Easterbrook, joined by four judges, voted against rehearing. He emphasized that the Attorney General's approach would require "partial retroactivity," in which the FSA "does not apply to cases in which sentence was pronounced on August 2, 2010, or earlier, even if they were pending in the district court or appeal on August 3." 657 F.3d at 445-46. "As far as [he was] aware," however, "the Supreme Court has never held any change in a criminal penalty to be partially retroactive." *Id.* at 446. Rather, "[t]he choice always has been binary: retroactive or prospective." *Ibid.*

Chief Judge Easterbrook emphasized that Section 109 "makes all changes" to criminal punishments "prospective unless the new statute provides otherwise." 657 F.3d at 446. Although the defendants had argued that Section 109 is irrelevant to the FSA, he explained that "a law reducing criminal punishment is a repeal of the old statute and the enactment of a new one for the purpose of [Section] 109, and that a punishment is incurred when the crime is committed." *Ibid.* Thus, Section 109 "makes the [FSA] prospective, because [the latter] lacks an express declaration of retroactivity." *Ibid.*

Although Chief Judge Easterbrook noted that the court “gives respectful consideration to the rationale for the new position” whenever the “Executive Branch confesses error,” he also observed that “[t]he Memorandum does not discuss [Section] 109 or the language of the [FSA],” and “does not explain why *partial* retroactivity is appropriate—or why the transition should depend on the date of sentencing rather than some other event.” 657 F.3d at 447. “The observation that Congress, the President, and many federal judges think the former rules excessively severe,” he noted, “does not distinguish the [FSA] from any other law reducing sentences and does not justify disregarding the anti-retroactivity norm created by [Section] 109.” *Ibid.*

Chief Judge Easterbrook acknowledged that, although Section 109 “says that only an ‘express’ provision in a later statute can support retroactivity,” Congress is nonetheless “entitled to change that rule,” and “[a] necessary (or fair) implication” could “show that Congress has amended [Section] 109 to that extent.” 657 F.3d at 448. The FSA, however, contains no such implication. Section 8 of the FSA, for instance, which grants the Sentencing Commission emergency authority to promulgate amended guidelines, did not “imply anything about when the new minimum and maximum sentences go into force.” *Id.* at 450. And Congress’s directive in Section 10 of the FSA— instructing the Commission to generate a report on the FSA’s effects within five years—also does not suggest retroactivity; indeed, if it had any relevance, the report would “produce meaningful results only if limited to persons whose criminal conduct occurs while the [FSA] is in force.” *Ibid.*

2. Judge Williams, joined by four judges, dissented from the denial of rehearing. She questioned why “Congress [would] want sentencing judges to continue to impose sentences that it had already declared to be unfair.” *Holcomb*, 657 F.3d at 457 (emphasis omitted). In addition to joining Judge Williams’s dissent, Judge Posner dissented separately, arguing that a “literal interpretation” of the FSA would lead to “perverse results.” *Id.* at 462.

SUMMARY OF ARGUMENT

The FSA does not apply retroactively to defendants whose criminal conduct occurred before its effective date, whether or not the defendants were (like Petitioners here) sentenced after that date. Section 109 forbids retroactivity, and nothing in the FSA expressly or impliedly repeals that command.

I. Since 1871, Congress has provided, by statute, a default rule governing when changes to the criminal law apply retroactively to benefit defendants who incurred penalties under prior law. The general saving statute provides that, in the absence of an “expres[s] provi[sion]” to the contrary, “[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute.” 1 U.S.C. § 109. Section 109 governs here: Applying the FSA retroactively would “release or extinguish” the mandatory-minimum “penalt[ies]” that Petitioners “incurred under” the now-“repeal[ed]” prior law. Because the FSA does not *expressly* provide for retroactive application, Section 109 dictates that it be applied prospectively.

A. The FSA “repeal[ed]” the prior law governing sentences for crack-cocaine offenses by increasing the drug-quantity thresholds necessary to trigger mandatory-minimum sentences under 21 U.S.C. § 841(b).

Although Dorsey seeks to characterize the FSA as only "amending" Section 841(b), the pre- and post-FSA versions of the statute cannot both be applied to the same offender; possession of 5 grams of crack cocaine was, but is no longer, punished by a five-year mandatory minimum, and possession of 50 grams is now punished by a five-year minimum instead of the previously applicable ten-year sentence.

Dorsey nonetheless contends that Section 109 is inapplicable to "ameliorative" amendments in which, as here, the relevant penalty provisions are lowered. This Court has already held, however, that Section 109 governs, and precludes retroactive application of the new statute, in exactly these circumstances. See *Warden v. Marrero*, 417 U.S. 653, 660 (1974). And even if this Court were to ignore the overwhelming force of *stare decisis* in the statutory context, Section 109 speaks with unmistakable clarity in addressing the repeal of "any statute," and precluding the release of "any penalty" incurred under prior law—including the mandatory-minimum sentences that Petitioners now seek to avoid.

B. Section 109 provides that the FSA's repeal of the previously applicable mandatory minimums will not be applied retroactively if doing so would avoid "any penalty, forfeiture, or liability incurred under" prior law. 1 U.S.C. § 109. This Court has recognized that the phrase "penalty, forfeiture, or liability" includes all forms of criminal punishment, *see, e.g.*, *Marrero*, 417 U.S. at 661, and thus the only remaining issue is whether the mandatory-minimum sentences provided by Section 841(b) were "incurred under" the prior version of the statute.

As lexicographers since Samuel Johnson have recognized, the defendant "incur[s]" a penalty when

he becomes liable to it. And that occurs, in turn, at the time of the criminal conduct—not, as Dorsey would prefer, when the defendant is ultimately sentenced. Although Dorsey insists that prosecution and sentencing are additional “facts” that must occur before any penalty is incurred, the Court has previously applied Section 109 even where the defendant was not sentenced (or even indicted) until after the repeal at issue. Dorsey’s approach also ignores the second clause of Section 109, which provides that the repealed statute will “remai[n] in force for the purpose of sustaining any proper action or prosecution for the enforcement of *such penalty.*” 1 U.S.C. § 109 (emphasis added). This clause would make little sense if “such penalty” were not incurred until after sentencing.

II. Section 109 is an enacted federal statute that binds the courts, but it does not bind Congress. Congress is free, subject to constitutional constraints, to apply changes in the criminal law retroactively if it desires to do so. But in the absence of any express indication to that effect, the Court can conclude that Congress superseded Section 109 in a later statute *only* if it concludes that the later statute amounts to an implied repeal of Section 109. Petitioners and the government seek to elide the implied-repeal standard, offering isolated strands of text and history to suggest that Congress perhaps *assumed* some retroactive application of the FSA. But these materials do not give rise even to a weak inference of retroactivity, much less anything that would satisfy the demanding standard for finding an implied repeal of Section 109.

A. Petitioners and the government invoke Section 8 of the FSA, which grants the Sentencing

Commission emergency authority to adopt certain amendments to the Sentencing Guidelines. It is far from clear that this provision addresses itself to the minimum-quantity thresholds revised in Section 2 of the FSA. But assuming that it does, Congress had a perfectly good reason to expedite the revision process that requires *no* retroactive application of the FSA: The ordinary process for amending the Guidelines could have left Guidelines based on prior law in place well after passage of the FSA, during which time *post-FSA* offenders would be sentenced under pre-existing Guidelines higher than the new mandatory minimums.

Petitioners and the government fare no better in invoking Section 10 of the FSA, which requires the Commission to report to Congress within five years on the effect of the FSA's changes. Contrary to their assumption, it is hardly likely that the bulk of offenders sentenced during that time will have committed their offenses before the FSA was enacted, and thus the Commission should have more than adequate data even if the FSA applies only prospectively. And even if it were otherwise, Petitioners and the government never explain why Congress would have wanted to study how its change in sentencing practices affects the decisions of those who violated federal law before that change was introduced.

Yet even if Petitioners and the government were correct that their reading of Sections 2 and 10 provides some inference regarding retroactivity, the interpretation that they draw from those provisions is sufficiently absurd that Congress could not have intended it. In their telling, Congress intended the FSA to be applied retroactively to defendants whose crimes occurred before—but whose sentencing oc-

curred after—enactment of the statute, but not to otherwise *identically* situated defendants who happen to have been sentenced earlier. The Court recently noted the absurdity of permitting criminal penalties to “depend on the timing of the federal sentencing proceeding,” *McNeill v. United States*, 131 S. Ct. 2218, 2223-24 (2011), yet that is *precisely* the approach that Petitioners and the government would attribute to Congress. There is no reason to believe that Congress meant for defendants guilty of the same crime, committed at the same time and perhaps even as part of a single conspiracy, to be sentenced differently based on the happenstance of how quickly the judicial system resolved their cases.

B. Petitioners and the government similarly miss the mark in invoking the history and purpose of the FSA. They emphasize that the FSA was designed to eliminate “unfairness” in the sentencing process. Congress never avowedly changes sentencing practices to make them *less* fair; yet the general rule enacted by Congress in Section 109 precludes retroactive application of those changes in the mine run of cases.

Moreover, Petitioners and the government err by assuming that whatever they believe to further the FSA’s objective must be the law; rather, as this Court frequently notes, legislation involves compromises among competing values. That is particularly true in the case of the FSA, which adopts a mix of provisions that in some cases favor, and in others disfavor, crack-cocaine offenders. Petitioners and the government cannot single out only the former for retroactive treatment.

Petitioners and the government nonetheless insist that congressional intent on the retroactivity is-

sue can be discerned from the fact that the bill ultimately enacted by Congress lacks an express anti-retroactivity provision that had been contained in an earlier House bill. This language would have been surplusage in light of Section 109, however, so no inferences about Congress's intent can be drawn from its omission.

C. Finally, Petitioners urge this Court to resolve any ambiguities on the retroactivity issue in their favor by invoking the rule of lenity and constitutional avoidance. Neither doctrine applies here. Petitioners claim that the FSA is potentially a violation of the equal-protection component of the Fifth Amendment. But constitutional avoidance requires *serious* doubts about the constitutionality of the statute, and there is no serious contention that the crack-cocaine sentencing regime involves the sort of *intentional* discrimination necessary to raise equal-protection concerns. And the rule of lenity is applicable only where, after applying the ordinary tools of statutory construction, there remains uncertainty about whether Congress intended to subject an offender to increased punishment. There is, however, no room for ambiguity here.

ARGUMENT

This case involves the interaction between two provisions adopted by Congress. The general saving statute provides that, in the absence of express direction by Congress, changes in the criminal law do not apply retroactively to release penalties incurred before those changes take effect. *See* 1 U.S.C § 109. The FSA is such a change: It eliminates or reduces the minimum sentences previously applicable to certain drug offenses, without any express indication that Congress intended the change to apply retroac-

tively. Under Section 109, therefore, the FSA cannot be applied to drug offenses that occurred before its enactment.

Petitioners and the government do not dispute that the FSA is inapplicable to defendants who were sentenced before its effective date. They nonetheless advance a theory of “partial retroactivity,” under which the FSA applies to defendants whose criminal activity occurred before, but who were not sentenced until after, the statute became effective. Under this approach, two defendants whose criminal activity was identical in *every respect*, including the date of the offense, could be sentenced differently depending solely on the speed with which their prosecutions moved through the judicial system.

Although it would be strange and unprecedented to have the FSA’s “applicability depend on the timing of the federal sentencing proceeding,” *McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011), Congress could perhaps have enacted that approach. The question is whether it did so.

Section 109 provides the starting point for this inquiry: Congress has provided clear and binding direction to the courts that, when it intends criminal legislation to release previously incurred penalties, it will say so expressly. As enacted law in its own right, Section 109 must be “treated as if incorporated in and as a part of subsequent enactments.” *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). And because Congress did not provide for retroactivity in the FSA, it should not “lightly . . . be presumed” by the courts. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955).

Although Section 109 provides the governing rule for construing later statutes, Congress is free to re-

peal any law, including Section 109 itself. *See Great N. Ry.*, 208 U.S. at 465; *see also*, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). But the standard for declaring that Congress superseded Section 109, in the absence of any statement to that effect in the FSA, is intentionally high: It requires a *repeal* of the earlier law by “necessary” or “plain” implication from the later statute. *Great N. Ry.*, 208 U.S. at 465; *Hertz v. Woodman*, 218 U.S. 205, 218 (1910); *see also*, e.g., *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (“unambiguous import”).

That is because, if Section 109 textually applies, it must be given effect unless another exercise of the lawmaking power requires a different outcome. To conclude that Section 109 has been implicitly superseded, the Court *must* find that the FSA amounts to a partial implied repeal of the statute—an inquiry subject to the “stringent standard” that “there be an ‘irreconcilable conflict’ between the two federal statutes at issue.” *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996). Cherry-picked legislative remarks and gauzy inferences that do not amount to a new *law* on the specific point at issue—retroactivity—do not carry the day.

Here, Section 109 applies, and nothing in the FSA repeals its anti-retroactivity command. Because there is “no conflict” between Section 109 and the FSA on the retroactivity question, *Warden v. Marerro*, 417 U.S. 653, 659 n.10 (1974), the “general principles of construction requiring, if possible, that effect be given to all the parts of a law” demand applying Section 109 to preclude retroactivity, *Great N. Ry.*, 208 U.S. at 465.

I. UNDER SECTION 109, THE FSA DOES NOT APPLY RETROACTIVELY TO DEFENDANTS WHOSE CRIMES WERE COMMITTED BEFORE ITS EFFECTIVE DATE.

The Seventh Circuit correctly held that the FSA's alteration of the drug-quantity thresholds necessary to trigger mandatory-minimum sentences does not apply retroactively to defendants whose criminal conduct predates the FSA, regardless of when their sentencing occurs. The FSA "repeal[ed]" prior penalty provisions applicable to the relevant drug offenses, and retroactive application of the FSA to defendants whose conduct predicated it would "release or extinguish" the "penalt[ies]"—that is, fines and mandatory-minimum terms of imprisonment—"incurred under" prior law. 1 U.S.C. § 109. Because it is common ground that "[t]he FSA does not expressly state that the amended provisions of 21 U.S.C. [§] 841(b) will apply in sentencing proceedings for pre-enactment offenders," U.S. Br. 26, Section 109 prohibits retroactive application of the FSA.²

A. THE FSA "REPEAL[ED]" PRIOR PENALTY PROVISIONS.

Section 109 applies when a later-enacted statute "repeal[s]" an earlier penalty provision. According to Dorsey, however, the FSA did not "repeal" prior law but is instead an "ameliorative amendmen[t]." Dorsey Br. 39. This false dichotomy is foreclosed by the statutory text and inconsistent with this Court's longstanding caselaw governing Section 109. It is undoubtedly for this reason that the government has

² See, e.g., Hill Br. 16 (discussing "[l]egislative silence" about retroactivity); Dorsey Br. 16 (conceding that the FSA does not "expressly" manifest congressional intent on the issue).

rejected Dorsey's position, *see U.S. Br.* 50 (noting that "the FSA is the sort of ameliorative criminal legislation that may trigger" Section 109), and that even Hill cannot bring himself to endorse the argument, *see Hill Br.* 32 (suggesting only that Dorsey "might" be correct).

1. As this Court recognized shortly after Section 109 was enacted, the governing test for whether a later statute "operates . . . as a repeal of the first" is whether "the two are repugnant in any of their provisions." *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). "Where provisions in the two acts are in irreconcilable conflict," then "the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

This test is plainly satisfied here. The FSA replaced the drug-quantity thresholds necessary to trigger fines and mandatory-minimum sentences under 21 U.S.C. §§ 841 and 960, and it abolished the mandatory-minimum sentence under 21 U.S.C. § 844. In these respects, the FSA lowered the applicable imprisonment penalties (while increasing the maximum fines) for precisely the same illegal conduct, in ways that are "clear[ly] repugnan[t]" (*Tynen*, 78 U.S. (11 Wall.) at 92) to the prior penalty provisions: Although defendants who possess 5 or 50 grams of crack cocaine would have faced five- or ten-year mandatory-minimum sentences before the FSA's effective date, those same amounts no longer trigger the previously applicable minimum sentences; defendants who possess 5 grams of crack are no longer subject to a mandatory-minimum sentence, whereas those who possess 50 grams are now subject

to a five-year minimum rather than ten years, as was formerly the case.

2. Dorsey attempts to draw a sharp distinction between “repeals” and “amendments,” noting that the FSA describes itself only as “amend[ing]” Section 841(b). Dorsey Br. 43 (quoting FSA § 2(a), 124 Stat. 2372). This ignores, however, that the FSA expressly eliminated the old thresholds by “striking” them from Section 841(b)(1) and replacing them with new thresholds. FSA § 2(a)-(b), 124 Stat. 2372. As a consequence of the FSA’s enactment, the version of Section 841(b)(1) that prescribed the relevant penalties for both Petitioners is no longer in effect.

There are indeed amendments that do not repeal prior law, in which case “the later act is to be construed as a continuation of, and not a substitute for, the first act.” *Posadas*, 296 U.S. at 503; see also *Tynen*, 78 U.S. (11 Wall.) at 92 (“the rule is to give effect to both if possible”). But whether the later statute is characterized as an “amendment” or otherwise, the test for “repeal” is the same: whether the later statute “irreconcilabl[y] conflict[s]” with the earlier one. *Posadas*, 296 U.S. at 503; cf. *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964) (noting that the federal saving statute applies to “amendment and repeal”). Here, there is no question that the pre- and post-FSA versions of 21 U.S.C. § 841(b) cannot *both* be applied to the *same* offender.

Indeed, Dorsey’s own sources confirm that a “repeal” includes the enactment of a new provision that “contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force” with respect to the same offender. Dorsey Br. 40 n.18 (quoting *Black’s Law Dictionary* 67 (2d ed. 1891)). When an amendment

replaces certain statutory terms with other terms, the two provisions are irreconcilable, and only one can remain in force.

It is therefore “immaterial” whether an “existing statute is specifically repealed and a new and different one is passed to replace it, or whether the existing statute is modified by amendment.” *Moorehead v. Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). “In either event, a new statute comes into being and the old one ceases to exist.” *Ibid.*; see also *United States v. Jacobs*, 919 F.2d 10, 12 (3d Cir. 1990) (Cowen, J., joined by Alito, J.) (“plain language of the saving statute indicates that it prevents statutory amendments from affecting penalties retroactively”).³ Because the FSA’s “amendment” of Section 841(b) operated as a “repeal” of the previously applicable mandatory-minimum provisions, Section 109 applies.

3. As this Court has recognized, “[a]batement by repeal” at common law “included a statute’s repeal and reenactment with different penalties.” *Bradley v. United States*, 410 U.S. 605, 607-08 (1973). Dorsey nonetheless insists that Section 109 should be interpreted as applying only “when a statute amended a prior statute by *increasing* the penalties,” so that it would not “preclude the application of *ameliorative* penalty provisions.” Dorsey Br. 47, 51 (second em-

³ See also, e.g., *United States v. Stillwell*, 854 F.2d 1045, 1048 (7th Cir. 1988) (noting that Section 109 “has been repeatedly held to apply to amendments to criminal statutes”); *United States v. Breier*, 813 F.2d 212, 215 (9th Cir. 1987) (Section 109 “appl[ies] to statutory amendments”); *White v. Warden*, 566 F.2d 57, 59 (9th Cir. 1977) (same); *United States v. Mecham*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975) (per curiam) (“The saving statute is not made inapplicable because an amendment instead of outright repeal changes a statutory punishment.”).

phasis added); *see also* NACDL Amicus Br. 3-12. It is not clear how this argument helps Dorsey's position, since the FSA reduces imprisonment, but raises fines, for the same offenders. But even if the Court were to focus solely on the "ameliorative" portion, Dorsey's argument is baseless.

a. Dorsey's purported distinction between "ameliorative" and other amendments is foreclosed by this Court's decision in *Marrero*. The Court emphasized that "[c]ommon-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties." 417 U.S. at 660 (emphasis added). The Court therefore held that Section 109 "bar[red] the Board of Parole from considering respondent for parole" (*id.* at 659) based on a statutory amendment that would undoubtedly be considered "ameliorative" in Dorsey's view. *See, e.g., id.* at 664 (noting that the previously applicable parole prohibition was a "punitive measure").

Dorsey claims that *Marrero*'s "holding was unnecessary," and thus "might be considered dicta," because "[t]he repealing statute in that case" also "included a saving clause." Dorsey Br. 53. But even Dorsey is forced to acknowledge that this Court's discussion of Section 109 was an "alternative holding." *Id.* at 55. After addressing the statute-specific saving clause, the Court "*held further* that the general saving clause" in Section 109 precluded retroactive application of the statutory change. *Marrero*, 417 U.S. at 659 (emphasis added). "It does not make a reason given for a conclusion in a case *obiter dictum*" that "it is only one of two reasons for the same conclusion." *Richmond Screw Anchor Co. v. United*

States, 275 U.S. 331, 340 (1928); *see also, e.g.*, Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949).

Because *Marrero*'s interpretation of Section 109 was a holding rather than *dictum*, the suggestion by Dorsey and his *amici* that the Court should "reconsider" (Dorsey Br. 39) or "repudiate" (NACDL *Amicus* Br. 2) *Marrero* is profoundly misplaced. "Considerations of *stare decisis* have special force in the area of statutory interpretation," because "Congress remains free to alter what [the Court] ha[s] done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Neal v. United States*, 516 U.S. 284, 295 (1996) ("[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*").

If Congress had any reason to believe that this Court misinterpreted Section 109 in *Marrero*, it has had nearly four decades to correct the problem. Yet it has continued to legislate against the backdrop of Section 109, just as it had done for the previous century of the statute's existence, without any change in its language.

Indeed, Congress's decision not to amend Section 109 is particularly significant because that statute is a "framework la[w] that facilitate[s] interpretation—and thus facilitate[s] legislation, too, by giving the legislature a formulary to use." *Holcomb*, 657 F.3d at 448 (Easterbrook, C.J., concurring in denial of rehearing). As this Court has noted, it is of "paramount importance" that "Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley v. United States*, 490 U.S. 545, 556 (1989). This Court's decision in *Marrero* is precisely such a "clear interpret[ation]" of Section 109, yet

Congress has provided no indication that it would prefer to “legislate against a [different] background.” *Ibid.*

b. Even if this Court were free to revisit the issue, it should conclude—as *Marrero* did—that Section 109 applies equally to “ameliorative” statutory amendments. Tellingly, Dorsey opens his argument on this point by discussing the legislative history of Section 109, see Dorsey Br. 44-46, but he somehow never gets around to addressing the statutory text. There is a simple reason for this omission: Section 109 does not support any distinction between “ameliorative” and other changes to penalty provisions.

Section 109 addresses the “repeal of *any* statute” that would otherwise release “*any* penalty.” 1 U.S.C. § 109 (emphases added). “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” *United States v. Gonzalez*, 520 U.S. 1, 5 (1997) (quoting *Webster’s Third New International Dictionary* 97 (1976)). Congress did not cabin this broad statutory language based on the nature of the repeal at issue, nor did it limit the statute’s focus to a particular type of change in penalties. Because retroactive application of the FSA would release previously incurred mandatory-minimum sentences, Section 109 applies.

The history of Section 109 further confirms that it applies even to “ameliorative” amendments. Section 109 was enacted to displace the common-law doctrine of abatement. See, e.g., *Marrero*, 417 U.S. at 660. And Dorsey does not seriously dispute that, at common law, there were “instances in which prosecutions were abated following an amendment that lowered a penalty,” Dorsey Br. 51; indeed, he concedes “at least six” such abatements, *id.* at 48 n.24

(citing *Ameliorative Criminal Legislation*, *supra*, at 126 nn.41-43); *see also, e.g.*, *Commonwealth v. Kimball*, 38 Mass. (21 Pick.) 373, 376-77 (1838) (statute changing penalty from fine of \$20 to fine between \$10 and \$20); *Rex v. Davis*, 168 Eng. Rep. 238 (1785) (statute changing penalty from death to fine). Shortly after Section 109's enactment, indeed, this Court drew no distinction between increases and decreases to prior penalties: In *Tynen*, the Court held that a statute increasing the applicable penalties in some respects, and decreasing them in others, repealed (and abated prosecutions under) an earlier statute. 78 U.S. (11 Wall.) at 93.

Dorsey nonetheless envisions a contrary rule under which, “rather than abate prosecutions,” courts would sometimes apply later-enacted, but “ameliorative,” penalty provisions. Dorsey Br. 49. This Court has already recognized, however, that “[c]ommon-law abatements” did not depend on whether the new statute “increased or decreased the penalties.” *Marrero*, 417 U.S. at 660; *see also Bradley*, 410 U.S. at 608 (same). Rather, “[b]y the repeal the legislative will is expressed that no further proceedings be had under the act repealed.” *Tynen*, 78 U.S. (11 Wall.) at 95. Because this rule applied universally to any repeal, there was full abatement at common law whether the repeal was ameliorative or otherwise. Section 109 was thus “designed to ensure that a convicted criminal does not fortuitously benefit from more lenient laws that may be passed after he or she has been convicted.” *United States v. Smith*, 354 F.3d 171, 174 (2d Cir. 2003) (Sotomayor, J.); *see also, e.g.*, *Holiday v. United States*, 683 A.2d 61, 79 (D.C. 1996) (emphasizing that, under Section 109, “individuals should be punished in accordance with the

sanctions in effect at the time the offense was committed").⁴

c. Dorsey attempts to escape the plain text of Section 109 and this Court's decision in *Marrero* by invoking *Hamm*'s statement that Section 109 "was meant to obviate mere technical abatement." 379 U.S. at 314. According to Dorsey, "[a] 'technical abatement' occurred when a new statute amended a prior statute by *increasing* the penalties." Dorsey Br. 47. Dorsey's reliance on *Hamm* is misplaced.

In *Hamm*, the Court held that the Civil Rights Act abated prosecutions under state trespass laws that violated the Act's anti-discrimination provisions. 379 U.S. at 308, 312-16. The Court emphasized that

⁴ Dorsey also invokes the Tenth Circuit's statement in *Moorehead* that, "where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto." 198 F.2d at 53. Even *Moorehead* acknowledged that this supposed rule "appl[ied] only where there {was} no general saving statute," *ibid.*, so it can hardly assist Dorsey here. But the Tenth Circuit was mistaken in any event. It is difficult to determine the precise basis for the Tenth Circuit's statement given its belief that "citation of authorities and their discussion and analysis would not be helpful." *Ibid.* The court appears, however, to have confused a distinct body of caselaw holding that, although a statutory change to the applicable penalties for a crime will abate prosecutions under prior law, the legislature may nonetheless choose to apply the new penalties to crimes committed before the amendment, just as it could decide to retain the old penalties through a saving clause. See *State v. Daley*, 29 Conn. 272, 1860 WL 1173, at *2 (1860) (discussing alternatives); see also *Ameliorative Criminal Legislation*, *supra*, at 123-24. That an increased penalty could not be imposed retroactively consistent with *ex post facto* principles explains why these cases always involved a reduction in the applicable penalty. See *Daley*, 1860 WL at *2.

Section 109 “was meant to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen* decided in 1871,” in which “a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution.” *Id.* at 314.⁵ “In contrast,” the Court explained, “the Civil Rights Act works no such technical abatement.” *Ibid.* “[I]t substitutes a right for a crime,” and “[s]o drastic a change is well beyond the narrow language of amendment and repeal.” *Ibid.*

Dorsey reads the decision in *Hamm* as limiting Section 109 to cases where “a new statute amended a prior statute by *increasing* the penalties.” Dorsey Br. 47. But as this Court has subsequently clarified, *Hamm*’s holding is that Section 109 does not apply where (unlike here) Congress radically changes the legal landscape, such as by replacing a criminal prohibition on certain conduct with an entitlement to engage in it. *See Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 434-35 (1972).

Although the statute at issue in *Pipefitters* “may . . . make lawful what was previously unlawful,” the

⁵ The Court’s original opinion reportedly stated that *Tynen* was “decided in 1870,” John P. MacKenzie, Comment, *Hamm v. City of Rock Hill and the Federal Saving Statute*, 54 Geo. L.J. 173, 174 (1965) (quoting preliminary print), which in context implied that Congress enacted Section 109 in response to *Tynen*. But *Tynen* was not decided until April 10, 1871—weeks after Section 109 was adopted. Cf. 16 Stat. 431. MacKenzie evidently apprised the Court of this error shortly after *Hamm* was issued, and the Court amended its opinion accordingly. See MacKenzie, *supra*, at 182 (reprinting letter from Supreme Court Reporter of Decisions). Even as amended, however, the Court’s discussion of *Tynen* still incorrectly suggests that Congress was responding to *Tynen*.

Court declined to apply *Hamm* because the statute did not “substitute a right for a crime.” 407 U.S. at 434 (alteration omitted). “To the contrary,” the Court explained, the statute “retains the basic offense,” and thus Section 109 applied. *Id.* at 434-35. Similarly here, the FSA “retains the basic offense”—the prohibitions on drug possession, distribution, and the like remain in force, *see* 21 U.S.C. § 841(a)—but alters only the applicable punishment. In no sense does the FSA create a “right” to engage in drug-related conduct where there once was a criminal proscription.

Yet even if this Court were to read *Hamm* as limiting Section 109 to “technical abatements,” there is no basis for Dorsey’s argument that only *increases* in the applicable penalties would result in a technical abatement. The Court cited *Tynen* as an example. *See* 379 U.S. at 314 (“such as that illustrated”). But the statute at issue there both increased and decreased the applicable penalties. *See supra* at 26. In any event, *Marrero* later emphasized that even penalty *decreases* could result in a technical abatement: “[I]f the repeal of [a penalty provision] can be viewed as mitigating [the defendant’s] punishment under [prior law],” then “his conviction and sentence would not be left intact by the repealer and his prosecution would ‘technically’ abate under the common-law rule.” 417 U.S. at 660 n.11 (citing *Hamm*, 379 U.S. at 314).

The logic of the common-law rule is that, once a new statute replaces an old one, no one can be prosecuted under the old version because it no longer exists; this result has nothing to do with the nature of the amendment—a new provision increasing penalties has “repealed” the prior law in exactly the same

way as a new provision decreasing penalties. In either case, the original statute is “technically” gone. The adjective “technical” thus does not distinguish between increases or decreases in penalties, but between the “narrow language of amendment and repeal” that had given rise to artificial abatements at common law, and the type of “drastic” changes at issue in *Hamm*, in which previously criminal activities became protected activity. 379 U.S. at 314.

d. Finally, Dorsey’s reliance on the saving statute’s legislative history also misses the mark. As an initial matter, because Section 109 unambiguously applies to ameliorative sentencing amendments, this Court should “not resort to legislative history” at all. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). In any event, there is no pertinent legislative history; Dorsey concedes that neither chamber even “discussed the saving statute during the debate of the 1871 Act.” Dorsey Br. 44; see also John P. MacKenzie, Comment, *Hamm v. City of Rock Hill and the Federal Saving Statute*, 54 Geo. L.J. 173, 177 (1965).⁶

Dorsey’s “legislative history” argument instead rests on the fact that, *following enactment of the saving statute*, the commissioners appointed to simplify

⁶ As Dorsey notes, one legislator noted that the 1871 statute provides “a few general rules for the construction of statutes, and the effect of repealing statutes, all designed to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction.” Cong. Globe, 41st Cong., 3d Sess. 1474 (1871). This is true, as far as it goes, but Dorsey never explains how it could support his interpretation of the statute—particularly since “statements by individual legislators . . . provide evidence of Congress’[s] intent” only “when they are consistent with the statutory language.” *Brock v. Pierce Cnty.*, 476 U.S. 253, 263 (1986).

and consolidate federal law proposed four provisions governing the effect of repeals, one of which would have reworded the saving statute. Dorsey Br. 45-46. They also noted, however, that the proposal “embodie[d] the substance” of the saving statute. MacKenzie, *supra*, at 181 (quoting *Commissioners’ Draft of the Revision of the United States Statutes* (1872)). Congress’s failure to adopt the proposals is as likely to have stemmed from the commissioners’ inclusion of two new provisions, which would have “add[ed]” to existing law, as anything else. *Ibid.*

Dorsey assumes that, because (in his view) the proposed revision would more clearly have encompassed “ameliorative” amendments, Congress’s failure to enact that proposal confirms that such amendments are outside the scope of Section 109. But the fact that another statute could be written to address an issue with even greater specificity does not mean that the existing statute is insufficiently clear to cover the situation. See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47-48 (1950) (drawing “no inference” from “Congress’s] failure to enact” a proposed “legislative clarification”). There is no basis for reading any particular interpretation of the saving statute into Congress’s failure to adopt the proposal, let alone an interpretation so clearly at odds with the text of the statute. See, e.g., *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

B. RETROACTIVE APPLICATION OF THE FSA WOULD “RELEASE OR EXTINGUISH” THE “PENALTIES” THAT PETITIONERS “INCURRED UNDER” PRIOR LAW.

Although the FSA “repeal[s]” previously applicable penalty provisions, Section 109 provides that this

repeal "shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under" prior law. 1 U.S.C. § 109. The mandatory-minimum sentences applicable under prior law are "penalt[ies]" within the meaning of Section 109, and defendants whose conduct predated the FSA's effective date "incurred" those penalties "under" the old statute. Section 109 therefore bars retroactive application of the FSA to "release or extinguish" those previously incurred penalties.

1. The phrase "any penalty, forfeiture, or liability" in Section 109 includes criminal punishments. *United States v. Reisinger*, 128 U.S. 398, 402-03 (1888). Indeed, because "[t]hese words" were "used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment,'" *id.* at 402, they sweep broadly to "include all forms of punishment for crime," *United States v. Ulrici*, 28 F. Cas. 328, 329 (C.C.E.D. Mo. 1875) (No. 16,594) (Miller, J.) (emphasis added), quoted with approval in *Marrero*, 417 U.S. at 661.

As this Court emphasized in *Marrero*, the issue whether a particular statutory change implicates a "'penalty, forfeiture, or liability' saved by [Section] 109" turns on whether the repealed provision was an "element of [the defendant's] 'punishment.'" 417 U.S. at 662-64. That is plainly the case here: Mandatory-minimum sentences are even more clearly an "element of [the] 'punishment'" than ineligibility for parole, which this Court held in *Marrero* was subject to Section 109. Although parole affects only *where* the defendant serves his sentence, a mandatory minimum affects the duration of the sentence itself: Where a mandatory-minimum sentence is applicable, "the expected punishment will have increased and

the government can require the judge to impose a higher punishment than she might have chosen otherwise.” *United States v. Krieger*, 628 F.3d 857, 869 (7th Cir. 2010); *see also; e.g.*, *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937) (applying the state *ex post facto* clause to mandatory-minimum provision).

2. The mandatory-minimum sentences at issue here were also “incurred under” prior law because the crimes were committed before the effective date of the FSA—regardless of when the sentencing occurred. Although Dorsey claims that a mandatory-minimum sentence has not been “incurred” until, “at a minimum,” the defendant has been “indicted, convicted, *and* sentenced,” Dorsey Br. 24 & n.11, this interpretation finds no support in the text of Section 109 or this Court’s precedents.

The defendant “incur[s]” a penalty when he “become[s] liable or subject” to it. *Webster’s New International Dictionary* 1261 (2d ed. 1949); *see also* 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (“to become liable to a punishment or reprehension”). Even courts of appeals that have held on other grounds that the FSA applies retroactively have agreed that the defendant becomes subject to a penalty at “the time of the conduct that makes the defendant liable rather than the date of conviction or imposition of the sentence.” *United States v. Goncalves*, 642 F.3d 245, 252 (1st Cir. 2011). The saving statute thus “clearly excepts offences committed before the passage of the repealing act.” *Reisinger*, 128 U.S. at 401 (emphasis added).

Indeed, it is difficult to see how Dorsey can credibly advance a contrary interpretation. The judicial process verifies that the defendant has engaged in criminal wrongdoing and assesses the penalty, but

that is not the process by which the defendant becomes subject to—that is, “incur[s]”—that penalty. And Congress, similarly, imposes the penalty for violating the law, not for doing a poor job in court.

According to Dorsey, however, his interpretation of “incurred” is compelled by this Court’s decision in *Hertz v. Woodman*, which held that an inheritance tax was incurred at the time of the decedent’s death and thus survived the later repeal of the tax statute at issue. 218 U.S. 205, 220 (1910). The Court reasoned that “the right of succession . . . passed by the death of the testator,” and “fasten[ed], at the moment th[e] right of succession passed by death, a liability for the tax imposed upon the passing of every such inheritance or right of succession.” *Id.* at 219-20.

Dorsey seizes on this Court’s statement that the “liability for payment of the tax . . . accrued or arose the moment the right of succession by death passed” to the decedent’s beneficiaries, at which point “the occurrence of *no other fact or event* was essential to the imposition of a liability for the statutory tax upon the interest thus acquired.” *Hertz*, 218 U.S. at 220 (emphasis added). But the same is true here: Once Petitioners committed each element of an offense subject to the then-applicable mandatory minimum, “*no other fact or event*” (*ibid.*) was necessary for a mandatory-minimum sentence under then-existing law.

Dorsey appears to assume that *Hertz*’s reference to “fact or event . . . essential to the imposition of a liability” would include, in the criminal context, each step in the prosecutorial process, including “the return of an indictment and a subsequent conviction,” Dorsey Br. 24, and “the determination of sentencing factors, such as drug quantity and the existence of a

prior conviction," *id.* at 29. But this reading would completely garble the second clause of the statute. Section 109 not only preserves "any penalty, forfeiture, or liability incurred under [a repealed] statute," it also provides that "such statute" will "remain[n] in force for the purpose of sustaining any proper action or prosecution for the *enforcement of such penalty.*" 1 U.S.C. 109 (emphasis added). The second clause allows the government to prosecute a defendant who has *already* incurred a penalty under a later-repealed statute—a provision that would make little sense if "such penalty" were not incurred until the defendant had already been convicted and sentenced.

Consistent with this commonsense reading of the statute, the Court has previously applied Section 109 where the defendant committed the offense at issue while the prior law was in effect but was sentenced only after its repeal. Indeed, in both *Reisinger* and *Great Northern Railway*, the defendants were not even indicted, let alone sentenced, for their crimes until after the repealing statutes had been enacted. See *Reisinger*, 128 U.S. at 400 (repeal in 1884; indictment in 1885 for conduct in 1883); *Great N. Ry.*, 208 U.S. at 459 (repeal in June 1906; indictment in November 1906 for conduct in 1905). Yet in both cases, the Court held that the saving statute prevented abatement of the prosecutions. See *Reisinger*, 128 U.S. at 401-03; *Great N. Ry.*, 208 U.S. at 464-70. Dorsey's reading of *Hertz* cannot be squared with these decisions.⁷

⁷ Dorsey briefly argues that Section 109 must be narrowly construed as a statute in derogation of the common law. Dorsey Br. 55-56. But this canon of construction is inapplicable where, as here, a statute "speak[s] directly" to the question addressed by the common law and manifests a clear purpose to abrogate

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II. NOTHING IN THE FSA'S TEXT, HISTORY, OR PURPOSE CLEARLY INDICATES CONGRESS'S INTENT TO DISPLACE SECTION 109.

According to Petitioners and the government, the text, history, and purpose of the FSA demonstrate that Congress intended to override the anti-retroactivity command of Section 109. They stress that the FSA's purpose was to displace a sentencing regime that was widely perceived as unfair, and they rely on two textual features that purportedly suggest that Congress intended the FSA to apply to all sentences imposed after its effective date.

The first of these textual features—Section 8 of the FSA—grants the Sentencing Commission emergency authority to issue “the guidelines, policy statements, or amendments provided for in [the FSA] as soon as practicable,” and to make any “conforming amendments . . . necessary to achieve consistency with other guidelines provisions and applicable law.” FSA § 8, 124 Stat. 2374. The second—Section 10 of the FSA—directs the Commission to study the “impact of the changes in Federal sentencing law” wrought by the FSA within five years of its enactment. FSA § 10, 124 Stat. 2375. That emergency authority, and the fact that pre-FSA offenders could be prosecuted within the five-year period to be studied, establishes—the argument goes—that Congress

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the common-law principle. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). Reversing the common-law rule is precisely why Congress enacted Section 109 in the first place. See, e.g., *Ulrici*, 28 F. Cas. at 329 (describing the saving statute as “a general provision changing . . . the rule of the common law”).

must have intended that the FSA apply to pre-FSA offenders.

Yet these arguments do not remotely demonstrate that Congress impliedly repealed the anti-retroactivity command of Section 109. Indeed, they do not support much of an inference about retroactivity at all—even apart from the exacting implied-repeal standard that applies here. *See supra* at 18.

As the government recognizes, the FSA was a package of changes to federal sentencing law, not all of them favorable to criminal defendants. While Section 2 of the FSA increased the quantities of crack cocaine necessary to trigger mandatory terms of imprisonment, for example, Section 4 steeply increased the fines applicable *to the same offenders*, whom Congress continues to view as “major drug traffickers.” FSA § 4, 124 Stat. 2375. Section 7 directed the Commission to “review and amend” the Guidelines to cabin or further reduce the sentences of certain defendants whose role in the offense was minimal, FSA § 7, 124 Stat. 2372-73, while Sections 5 and 6 mandated “additional penalty increase[s]” for certain aggravating factors, FSA §§ 5-6, 124 Stat. 2373-74.

Neither the government nor Petitioners seriously suggest that Congress meant *all* of these changes to apply immediately to pre-FSA offenders. Indeed, retroactive application of the fine increases would undoubtedly violate the Constitution. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.). And the same may be true of many applications of the aggravated Guidelines that the FSA prescribes. *See U.S. Br.* 29 n.6 (acknowledging, but disagreeing with, the weight of authority on this point). The government’s view implausibly imputes to Congress an intent to apply immediately only those

changes that favor offenders—even to the point of applying only *parts* of the amended versions of Sections 841(b)(1)(A) and (B) to particular defendants.⁸ The FSA, however, provides no textual or structural hint that Congress intended offenders to take the sweet without the bitter.

It also does not advance the inquiry to note that the FSA was intended to make the law fairer. All legislation in a democracy is meant to improve things; no legislature sets out to make the law avowedly less just. That the current wisdom is better than the old is a basis for making *all* legislation retroactive—a position that cannot be squared with Section 109. Indeed, this logic would support retroactivity even as to final convictions, which no one advocates.

Nor does the legislative history of the FSA help the “retroactivity” view. Apart from decrying the unfairness of existing law, most floor statements on which Petitioners and the government rely merely assert that the FSA would change that immediately, as indeed it would for anyone who violated the law from the moment the President signed the FSA. The

⁸ For example, while Hill would no longer be subject to the 10-year mandatory-minimum prison sentence under the post-FSA version of 21 U.S.C. § 841(b)(1)(A), he still would be subject to the penalty provisions of 21 U.S.C. § 841(b)(1)(B), even as revised, because he was found guilty of distributing 50 grams or more of cocaine base. If the revised version of Section 841(b)(1)(B) were applied to him, therefore, he would face a maximum fine of \$5 million, which is higher not only than the fine previously applicable to defendants prosecuted under Section 841(b)(1)(B) (\$2 million), but also than the maximum fine Hill faced under the pre-FSA version of Section 841(b)(1)(A) (\$4 million).

only aspect of the drafting history that is remotely pertinent to the specific question of retroactivity—that the FSA omits language expressly prohibiting retroactivity, which was present in an earlier bill—is equally consistent with the conclusion that such language was deemed repetitive of Section 109. See *Great N. Ry.*, 208 U.S. at 465.

Because nothing in the text, history, or purpose of the FSA establishes that Congress intended partial retroactivity, Section 109 precludes it.

A. THE FSA'S TEXT IS CONSISTENT WITH SECTION 109'S PRESUMPTION OF ANTI-RETROACTIVITY.

Petitioners and the government contend that failure to give retroactive effect to the new drug-quantity thresholds would render Sections 8 and 10 of the FSA “empty and pointless” (Hill Br. 20) and “essentially irrelevant” (U.S. Br. 23). This argument echoes interpretive canons that disfavor superfluity and absurd results, but invokes neither expressly because they do not support retroactivity here. Sections 8 and 10 do not address retroactivity at all, and reading them literally to mean only what they do say accomplishes worthy goals that can sensibly be ascribed to Congress.

1. The FSA’s most important textual feature, for purposes of this case, is its complete failure to say a single word about retroactivity. “Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law” but “predominantly a lawyers’ body.” *Callanan v. United States*, 364 U.S. 587, 594 (1961). For that reason, “[i]t is always appropriate to assume that our elected representatives . . . know the law.” *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-97 (1979). Because Congress must be presumed aware

of the legal context in which it legislates, “if anything is to be assumed from congressional silence” on retroactivity, it is that “Congress was aware” of Section 109 and “legislated with [that provision] in mind.” *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981). Neither of Petitioners’ textual arguments refutes this conclusion.

2. a. The “Emergency Authority” provision, Section 8(1) of the FSA, principally directs the Commission to promulgate “as soon as possible” the “guidelines, policy statements, or amendments provided for in this Act”—that is, by Sections 5-7 of the FSA. FSA § 8(1), 124 Stat. 2374. Section 2, which changes the minimum-quantity thresholds, does not “provide for” any new guidelines.

Section 8(2), in turn, directs the Commission to make “such conforming amendments” to the Guidelines as may be required to achieve “consistency with other guideline provisions and applicable law.” FSA § 8(2), 124 Stat. 2374. This text most naturally suggests that the “conforming amendments” are those to be made to *existing* guidelines to achieve consistency with the new guidelines to be issued pursuant to Section 8(1).

Although it is certainly *possible* to read Section 8(2)’s reference to “applicable law” as including other provisions of the FSA itself—rather than, say, only those pre-existing legal rules that otherwise apply to the Sentencing Commission specifically or to administrative action generally, *see infra* at 41 n.9—that interpretation is far from unavoidable. Petitioners and the government thus vastly overstate their case by treating Section 8 as though Congress’s principal objective was the immediate implementation of Sec-

tion 2. See U.S. Br. 28 (urging that Congress “necessarily” meant this).

b. Even under that reading of Section 8, however, there was ample reason for Congress to require expedition in the formulation of new crack-cocaine guidelines for *post*-FSA offenses. The government makes much of the fact that for federal non-marijuana drug offenses the “median time between indictment and sentencing” is “approximately 11 months.” U.S. Br. 30 n.7. But the *median* time means that half of all defendants are sentenced sooner than 11 months after their indictments—a period that could have swept in countless post-FSA offenders under pre-FSA Guidelines. Without emergency authority, the revised Guidelines would not have gone into effect for at least 180 days following the FSA’s enactment, and possibly not until November 1, 2011—more than a year after the FSA’s passage.⁹

⁹ Pursuant to its duty to “periodically . . . review and revise” the Guidelines, 28 U.S.C. § 994(o), the Commission may submit proposed amendments to Congress “at or after the beginning of a regular session of Congress, but not later than the first day of May,” *id.* § 994(p). The Commission must also publish proposed amendments in the Federal Register and provide a notice-and-comment period of at least thirty days. *Id.* § 994(x). The proposed amendments must “take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted [to Congress] and no later than the first day of November of the calendar year in which the amendment . . . is submitted.” *Id.* § 994(p). In practice, the Commission has adopted November 1 as the default effective date for its proposed amendments. See U.S. Sentencing Comm’n, *Rules of Practice and Procedure* § 4.1 (2007).

When Congress specifically instructs the Commission to conform the Guidelines to a new statute, the Commission typi-
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Moreover, the government fails to note that its statistics reflect a *national* pool of defendants; district courts in different regions have different backlogs, different dockets, and process cases at different speeds. See Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, tbls. D-6, at 254; D-12, at 276 (2011).

With each passing month before new Guidelines were announced, therefore, the risk increased that additional *post*-FSA offenders would be sentenced under pre-existing Guidelines. That obvious risk is all that is needed to make sense of Section 8's emergency authority; it is hardly necessary that the FSA be retroactive in order for Section 8 to have a real

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cally promulgates the necessary amendments through the same amendment process. In 2010, for example, Congress passed three statutes that instructed the Commission to promulgate conforming amendments to the Guidelines on a non-emergency basis: the Secure and Responsible Drug Disposal Act of 2010, Pub. L. No. 111-273, § 4, 124 Stat. 2858, 2860 (Oct. 12, 2010); the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1079A(a)(1) & (a)(2), 124 Stat. 1376, 2077-79 (July 21, 2010); and the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10606(a), 124 Stat. 119, 1006-07 (Mar. 23, 2010). The Commission responded to all three of these directives by publishing proposed amendments in the Federal Register on January 19, 2011, see *Sentencing Guidelines for United States Courts*, 76 Fed. Reg. 3193 (proposed Jan. 19, 2011), and then by submitting final amendments to Congress on April 28, 2011, see *Sentencing Guidelines for United States Courts*, 76 Fed. Reg. 24,960 (May 3, 2011). Each of the amendments took effect on November 1, 2011. *Ibid.*; see also U.S. Sentencing Guidelines Manual app. C, amend. 749 & 751 (2011).

“job” in the statutory scheme. See *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000).¹⁰

c. There is no greater merit to the government’s claim that Congress must have assumed retroactivity because it knew “that the resulting Guidelines amendments would apply immediately in all initial sentencing proceedings, including those involving offenses that predated the FSA.” U.S. Br. 28-29 (citing 18 U.S.C. § 3553(a)(4)(A)(ii)). This Court has held that the Guidelines in force at the time of sentencing cannot trump a mandatory-minimum penalty that otherwise is required by 21 U.S.C. § 841(b). See *Neal*, 516 U.S. at 289-90, 295. And the Guidelines themselves contemplate that statutory minimum sentences may exceed “the maximum of the applicable guideline range,” and provide that, in such cases, “the statutorily required minimum sentence shall be the guideline sentence.” U.S.S.G. § 5G1.1(b).

Thus, even if new Guidelines must “conform” to “the FSA’s penalty structure,” U.S. Br. 34, n.8, nothing about that requirement “creates a very different

¹⁰ Indeed, the fact that the “emergency” Guidelines might not issue for 90 days substantially weakens the retroactivity inference urged by the government. Under the government’s view, mandatory minimums would no longer apply on August 4, but the old Guidelines could remain for 90 days—subject only to the *discretion* to depart from those guidelines that individual judges enjoy but need not exercise, see, e.g., *Spears v. United States*, 555 U.S. 261, 264-65 (2009) (*per curiam*), and to the possibility that the Commission might exercise its *discretion* to make the new amendments retroactive, see 28 U.S.C. 994(u). But Congress’s willingness to live with old Guidelines for those sentenced in the most immediate aftermath of the FSA—in the main, as the government says, pre-FSA offenders—suggests that it did not perceive any particular unfairness in applying old law to them.

regime" (*ibid.*) for offenses that *predated* the FSA. When a defendant is sentenced for those offenses in accordance with Section 5G1.1(b), he *is* receiving a Guidelines sentence, and that sentence *does* "conform" to "applicable law."

d. Finally, Congress was well aware that courts may "impose a sentence pursuant to [the] guidelines . . . without regard to any mandatory minimum sentence" under the safety-valve provisions of 18 U.S.C. § 3553(f). Nonviolent offenders with limited criminal records can escape mandatory minimums (pre- or post-FSA) and receive whatever (lower) sentence is available under applicable Guidelines if they come clean about the offense "not later than . . . the sentencing hearing." *Id.* § 3553(f)(5). Congress presumably was aware that this provision offers the traditional tool for ameliorating the severity of mandatory minimums, and that the emergency issuance of the new Guidelines required by the FSA would further ensure that this tool would continue to work as intended.

The government does not appear to dispute this, but it discounts the relevance of this relief because most "crack offenders . . . are disqualified [from safety-valve relief] by their criminal histories." U.S. Br. 39 n.10. It would be strange if this were a "problem" that Congress was endeavoring to solve, even in part, by making the FSA retroactive. Congress does not ordinarily strain for leniency toward the classes of offenders ineligible for safety-valve relief: recidivists, violent criminals, and dealers "engaged in a continuing criminal enterprise." 18 U.S.C. § 3553(f)(2)-(4). Because non-violent first timers can escape mandatory sentences entirely under the safety valve, it is not especially likely that Congress in-

sisted on retroactivity so it could cut further the sentences of inveterate recidivists or violent criminals.

3. Section 10 of the FSA, which requires the Commission to report to Congress within five years on the impact of changes effected by the FSA, is even farther afield on the question of retroactivity.

The government argues that the offenders “*most likely*” to face sentencing “in the early *years* after the Act” are pre-FSA offenders, and thus that the FSA must apply retroactively to them so that the Commission may have something meaningful to “study.” U.S. Br. 35 n.9 (emphases added). Hill similarly contends that retroactivity is required “to compile useful data,” and that the Commission would confront a “heavy administrative burden” in “tracking which of the many thousands of defendants sentenced after the FSA committed their offenses before its enactment.” Hill Br. 25.

It is unlikely, however, that “most” offenders sentenced for “*years*” after the FSA will have committed their offenses before the statute was enacted. By the government’s own telling, many offenders are sentenced within *months* of being charged. U.S. Br. 30 n.7. The fact that the limitations period for drug offenses is five years (*id.* at 35 n.9) establishes only that prosecutions *can* be brought years after the offense, not that drug offenders are overwhelmingly apprehended on the eve of charges becoming time-barred. But only if crack dealers routinely escape apprehension and prosecution for nearly a lustrum—an alarming proposition were it true—would the Commission lack “useful data” on post-FSA offenses to study between 2010 and 2015. Neither the gov-

ernment nor Petitioners proffers a factual basis for believing this to be true.¹¹

Moreover, whatever the size of the data set, there is no reason to presume that Congress contemplated a pointless study of how revised sentencing practices may affect the decisions of those who violated federal law before the revised practices were in effect. As Chief Judge Easterbrook noted, “[a] study of the [FSA]’s effects will produce meaningful results only if limited to persons whose criminal conduct occurs while the [FSA] is in force.” *Holcomb*, 657 F.3d at 450 (concurring in denial of rehearing). If Section 10 provides an inference either way, accordingly, Petitioners and the government have it “backward[s].” *Ibid.*

Finally, the Commission has proved capable in the past of analyzing different groups of offenders subject to different sentencing schemes. See, e.g., U.S. Sentencing Comm’n, *Memorandum: Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment 2-3* (May 31, 2011). Correctly interpreted to apply only to offenders who violated the law after the FSA, Section 10’s directive is

¹¹ Hill notes that the median time between indictment and disposition is longer (17 months) if a defendant elects to stand trial. Hill Br. 21 n.7. Since “most criminal cases do not go to trial and resolution by plea bargaining is the norm,” *Blakely v. Washington*, 542 U.S. 296, 331 (2004) (Breyer, J., dissenting); *Brady v. United States*, 397 U.S. 742, 752 & n.10 (1970), it seems unlikely that Congress legislated with this statistic in mind. Even that figure confirms, though, that the Commission would have plenty to “study” if Section 10 encompasses only those crimes committed and prosecuted from 2010 until 2015.

scarcely beyond the Commission's comprehension or ability.

4. The interpretation urged by Petitioners and the government, even if arguably supported by their readings of Sections 8 and 10, is sufficiently odd that Congress could not have intended it. Indeed, just last Term, the Court unanimously rejected as "absurd" the notion that Congress would make the applicability of federal criminal penalties "depend on the timing of the federal sentencing proceeding." *McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011). Neither the government nor Petitioners cite *McNeill*. Yet their reading of the FSA produces the same incongruities that the Court found untenable in that case.

As in *McNeill*, the government and Petitioners urge that *identically* situated offenders—even those "who violated [the drug laws] on the same day and who had identical criminal histories"—"receive dramatically different federal sentences solely because" one "happened" to be sentenced after the FSA. 131 S. Ct. at 2223-24. Indeed, under this view of the FSA, crack dealers could benefit from strategic conduct that delayed sentencing—including outright misconduct, such as fugitivity—even as their co-conspirators, who promptly pleaded guilty and accepted responsibility for their crimes, received much harsher sentences. See *Holcomb*, 657 F.3d at 452 (Easterbrook, C.J., concurring in denial of rehearing); see also *United States v. Sidney*, 648 F.3d 904, 906 (8th Cir. 2011) (defendant engaged in machinations "all designed to delay the sentencing until after enactment and implementation of the FSA"), *pet. for cert. filed*, No. 11-8134 (Dec. 28, 2011).

The rank arbitrariness of the rule urged by the government is well illustrated by the cases at bar. According to the government, Petitioners are both entitled to the more lenient crack ratios prescribed by the FSA, even though their offenses were respectively committed in March 2007 (Hill) and August 2008 (Dorsey). But the government insists that the Seventh Circuit correctly denied relief to the defendant in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), because his case was already pending on appeal by the time the FSA was enacted. See U.S. Br. 48. Bell committed his crack-cocaine offense in January 2009—almost *two years* after Hill’s offense, and almost *six months* after Dorsey’s. *Bell*, 624 F.3d at 805. The differential treatment urged by the government cannot be justified on the basis of deterrence, dessert, or any other conceivably relevant penological aim.

The government claims that “ordinary rules of finality” that Congress “respected” require this result. U.S. Br. 23, 48. But “ordinary rules of finality” look at whether cases are, well, final. Criminal prosecutions are not final if direct review or certiorari remain available. See *Clay v. United States*, 537 U.S. 522, 527 (2003) (“Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires.”). Although Congress was presumably aware of this rule, the government offers no textual analysis demonstrating that Congress nonetheless intended that the FSA apply at sentencing but not on direct appeal—to *some* non-final cases, but not to others. Indeed, the hypotheticals that the government imagines in an attempt to make sense of its position—for instance, that the government may have dropped or

bargained charges away in reliance on then-existing mandatory minimums, U.S. Br. 48—suggest that retroactivity should be *precluded* for cases (like Petitioners') in which guilt was adjudicated before the FSA, even if the sentencing occurred later.¹²

Because neither Section 8 nor Section 10 demonstrates that Congress authorized “inconsistent and unjust outcomes among defendants arising from the vagaries of the scheduling process,” *State v. Reis*, 165 P.3d 980, 994 (Haw. 2007), Section 109 must be given effect. Accordingly, if penalties are to differ because of an arbitrarily selected date, the severity of the penalty should depend, as it has traditionally, upon the voluntary act of a defendant in choosing the date of his criminal conduct, not on the date of sentencing. *Cf. McNeill*, 131 S. Ct. at 2224 (“the interpretation we adopt permits a defendant to know even before he violates the law whether ACCA would apply”).

¹² The government also cites the administrative costs and judicial burden of holding new hearings for pre-FSA offenders subject to purportedly “final” sentences. U.S. Br. 48-49. Yet the government nowhere examines the costs on the other side of the ledger: the substantial expense of incarcerating an individual for years after a post-FSA sentence would have expired. See, e.g., Ctr. on the Admin. of Crim. Law *Amicus* Br. 21-23. It is far from obvious that the expense of additional hearings—or any other procedural mechanism devised to adjust final sentences—is so considerable that the government will expend fewer resources keeping pre-FSA offenders in prison for the duration of an “unfair” term. The far more likely explanation is the more plausible one: Congress did not draw a nuanced line at partial retroactivity, as the government urges, but instead deferred to the traditional anti-retroactivity default in Section 109.

B. NEITHER THE FSA'S HISTORY NOR ITS PURPOSE ESTABLISHES THAT CONGRESS INTENDED THE FSA TO APPLY RETROACTIVELY.

Petitioners and the government also contend that the history and purpose of the FSA demonstrate that Congress intended partial retroactivity. They cite statements of individual legislators reflecting the widespread and forceful critique of the 100-to-1 ratio, the “intens[e] concer[n]” engendered by the racial disparities produced by the old system, and the FSA’s overall purpose to “restore fairness” to cocaine sentences. U.S. Br. 46-50; Hill Br. 25-31.

None of these statements, concerns, and purposes, however, speaks directly to the question of retroactivity. And none purports to explain or construe any statutory *text* to show how its language, even if ambiguous, was actually meant to address retroactivity. This Court does not give “authoritative weight” to “legislative history that is in no way anchored in the text of the statute.” *Shannon v. United States*, 512 U.S. 573, 583 (1994). Even considering these legislative materials for all they might be worth, however, they do not establish that Congress intended any retroactive application, much less that it did so with the clarity required to repeal Section 109’s contrary command.

1. The “purposes” of the FSA do not require that it be applied to conduct that pre-dated its enactment. Because legislation requires compromise, “no legislation pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). Indeed, “[d]eciding what competing values will or will not be sacrificed to the achievement of a particular purpose is the very essence of legislative choice.” *Id.* at 526.

For this reason, “it frustrates rather than effectuates legislative intent simplistically to assume that *whatever furthers* the statute’s primary objective must be the law.” *Rodriguez*, 480 U.S. at 526; *see also*, e.g., *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). In particular, while “[i]t will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully,” that “is not sufficient to rebut the presumption against retroactivity.” *Landgraf v. USA Film Prods.*, 511 U.S. 244, 285-86 (1994) (footnote omitted).

Hill contends that these principles have no relevance here because there is “no evidence” that the FSA resulted from compromise or that “members of Congress bargained over whether an old law fraught with problems should continue to apply at sentencing.” Hill Br. 30-33. But *Rodriguez* and *Landgraf* prescribe interpretive rules based on the nature of the legislative process, not adjudicative facts that must be proven empirically for each new Act of Congress. In any event, it is *obvious* from the text and history of the FSA that the statute resulted from legislative compromises.

As the government notes, the Sentencing Commission spent the better part of two decades “firmly and unanimously” urging Congress to repeal the 100-to-1 ratio, and the Commission’s attempt to prescribe a 1-to-1 ratio “occasioned Congress’s only exercise of its power to disapprove a revision of the Guidelines.” U.S. Br. 8, 32. By adopting an 18-to-1 ratio, the FSA necessarily establishes that Members of Congress were not wholly persuaded that differential sentences for crack and powder cocaine are always unjustified. And the fact that Congress was willing to effect even *that* change only as part of a legislative

package that increased the severity of various punishments dispels any notion that the FSA could not have resulted from compromise. By seeking to cherry-pick for retrospective application only those changes that favor defendants, Petitioners and the government would undermine, rather than serve, the package of reforms that Congress enacted.

2. Individual statements by legislators decrying the old law (see Hill Br. 28-30; U.S. Br. 44, 46) do not add anything of consequence to Petitioners' argument. Congress undoubtedly wished to change the law, but none of these isolated statements establishes that Congress intended the change to be *retroactive*. And like the invocation of the FSA's purpose to restore "fairness," none of these statements explains or supports the peculiar retroactivity line that Petitioners and the government urge: that Congress somehow viewed re-sentencing hearings as such a monumental burden that it preferred to retain *existing* (and "unfair") sentences for offenders subject to a final judgment, and did not even intend to reduce the *existing* (and "unfair") sentences of offenders whose direct appeals were still pending when the FSA was enacted. See U.S. Br. 48-50. It is not unusual that parties abuse legislative history in cases involving statutory interpretation, but rarely are the proffered snippets of the legislative record so logically disconnected from the particular interpretation urged by the litigants.

3. The sole aspect of the legislative record cited by Petitioners and the government that is remotely pertinent to the retroactivity issue is that the Senate bill ultimately enacted by Congress (S. 1789) lacks an express prohibition on retroactivity that had been contained in H.R. 265, a House bill that purportedly

served as the model for the legislation. The government touts this as evidence that "Congress considered and rejected" the earlier prohibition and opted to permit retroactivity. U.S. Br. 44; see also Hill Br. 27 (same). Yet even assuming this "deletion" was deliberate, it says nothing definitive about legislative intent.

In failing to include an anti-retroactivity clause, Congress merely omitted language that would do what Section 109 already does. Because Section 109 operates as if its text is "incorporated" directly into each "subsequent enactmen[t]," *Great N. Ry.*, 208 U.S. at 465, there was no reason for Congress to include another prohibition on retroactivity in the FSA, see, e.g., *Marcello*, 349 U.S. at 309 ("[t]he deletion is nowhere explained, but it is possible that the phrase was considered unnecessary").

Indeed, if Congress inadvertently deleted the prohibition in order to *permit* retroactivity, one would have expected the FSA to address and permit retroactivity expressly. It defies credulity to contend that Congress somehow focused on the earlier bill's language, intentionally deleted that language in order to authorize retroactivity, and yet somehow did not think to include a single declarative sentence expressing that will in the FSA despite the obvious applicability of Section 109. In fact, since the House bill provided that "[t]here shall be no retroactive application of any portion of this Act," simply deleting the word "no" would have given Congress a running start. Only in comic opera does a task of such sim-

plicity call for the skills of “an old Equity draftsman.” W.S. Gilbert & Arthur Sullivan, *Iolanthe* act 2.¹³

C. NEITHER LENITY NOR CONSTITUTIONAL AVOIDANCE HAS ANY APPLICATION HERE.

Petitioners finally urge the Court to apply the FSA retroactively under principles of lenity and constitutional avoidance—in particular, to avoid “serious [c]onstitutional arguments implicating the guarantee of equal protection.” Hill Br. 38-39; *see also* Dorsey Br. 56-59. But constitutional avoidance requires the presence of “serious constitutional doubts,” *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added), and there can be no serious contention that crack-cocaine sentences involve the type of intentional discrimination by government actors that offends the equal-protection component of due process—even if the sentencing scheme produces racially disparate outcomes. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal

¹³ QUEEN OF THE FAIRIES: And yet (unfolding a scroll) the law is clear—every fairy must die who marries a mortal!

THE LORD CHANCELLOR: Allow me, as an old Equity draftsman, to make a suggestion. The subtleties of the legal mind are equal to the emergency. The thing is really quite simple—the insertion of a single word will do it. Let it stand that every fairy shall die who *doesn't* marry a mortal, and there you are, out of your difficulty at once!

Iolanthe, supra, act 2.

Protection Clause."); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (same).

The rule of lenity likewise has no application here. Lenity comes into play only when, after applying every canon of statutory interpretation, there is still "grievous ambiguity" about whether Congress intended to subject an offender to increased punishment. *Muscarello v. United States*, 524 U.S. 125, 139 (1998); see also, e.g., *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Thus, the rule of lenity is not an "overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz v. United States*, 498 U.S. 395, 410 (1991) (quoting *Callanan*, 364 U.S. at 596). Nor does the rule apply "merely because it is possible to articulate a construction" that is more favorable to the defendant's position than to the prosecution's. *Moskal v. United States*, 498 U.S. 103, 108 (1990). Nothing about the FSA, alone or in conjunction with Section 109, "is sufficiently ambiguous . . . to permit the rule to be controlling" here. *United States v. Rodgers*, 466 U.S. 475, 484 (1984).

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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**AMICUS
CURIAE
BRIEF**

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In The
Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

COREY HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writs Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit**

**BRIEF OF FORMER UNITED STATES
DISTRICT COURT JUDGES PAUL G. CASSELL
AND NANCY GERTNER AS AMICI CURIAE
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are two former United States District Court Judges who have sentenced defendants under the mandatory-minimum provisions of the Anti-Drug Abuse Act of 1986 (“1986 Act”), Pub. L. No. 99-570, 100 Stat. 3207 (1986). Both have written opinions and articles expressing their deep concerns about the unfairness of the onerous mandatory-minimum penalties for non-violent drug offenders and the racial disparities they have engendered. Both are now law professors who continue to research and write on the subject of sentencing and criminal justice policy.

Judge Paul G. Cassell was a judge of the United States District Court for the District of Utah from 2002 until 2007, and served on the Judicial Conference’s Committee on Criminal Law during a time when it recommended changes in the cocaine sentencing guidelines. He resigned the bench and joined the faculty of the S.J. Quinney College of Law at the University of Utah. Judge Nancy Gertner was a judge

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and counsel, made any monetary contribution towards the preparation and submission of this brief. See SUP. CT. R. 37.6. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certifies that counsel of record for both parties received timely notice of *amici curiae*’s intent to file this brief and have consented to its filing by letter on file with the Clerk’s office. See SUP. CT. R. 37.6(a).

of the United States District Court for the District of Massachusetts from 1994 until 2011. She resigned the bench in September of 2011 to join the faculty of the Harvard Law School.

SUMMARY OF ARGUMENT

Congress enacted the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (“FSA”), not simply to change the drug quantities needed to trigger the 5-, 10-, and 20-year mandatory-minimum penalties for offenses involving crack cocaine imposed by prior law. Congress enacted the FSA to correct the acknowledged errors of the 1986 Act. The FSA represents express conclusions that sentencing under prior law was unjust, that it was mistaken from the outset, that it did not fulfill any of the purposes of sentencing, and that it was the source of substantial racial disparity in federal sentencing.

Consistent with those conclusions, Congress took steps to implement the FSA as quickly as possible, directing the United States Sentencing Commission to amend the relevant sentencing guidelines within ninety days to conform them to the provisions of the new statute. While Congress did not explicitly indicate application to pre-enactment conduct, the general saving statute, 1 U.S.C. § 109, plainly does not apply where – as here – the will of Congress either “expressly” or by “fair implication” is clear. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659

n.10 (1974). As petitioners and the Solicitor General have argued, the text and structure of the FSA, together with its history and purposes, make apparent that Congress intended the FSAs revised mandatory minimums to be effective immediately in sentencing proceedings following its enactment.

As former U.S. District Court Judges, who have sentenced many individuals and have devoted considerable attention to mandatory-minimum penalties, we can attest that no other interpretation is consistent with criminal justice policy, the purposes of sentencing, or indeed, the structure the Guidelines regime. Concluding, as the Seventh Circuit did, that the FSA applies only to those whose crime occurred after the date of its enactment will dramatically compound the acknowledged unfairness of the 1986 Act. It will oblige federal district judges for five years after the FSA's enactment (the statute of limitations for these offenses) to perpetuate an injustice recognized not only by Congress, but by the Executive (through the Department of Justice), the Sentencing Commission, and the bench.

The Seventh Circuit's ruling exacerbates the very unwarranted disparities with which the Sentencing Reform Act was concerned – the sentencing of offenders to different terms of imprisonment, when their conduct was essentially identical – and continues racial disparities all three branches of government have found repugnant. And finally, continuing to apply repudiated mandatory-minimum penalties in the face of what in many cases will be drastically

lower applicable Guidelines ranges will severely undermine judges' attempts to apply § 3553(a), and will damage the legitimacy of the sentencing process.

ARGUMENT

I. ALL THREE BRANCHES OF GOVERNMENT HAVE ACKNOWLEDGED THAT THE PRIOR REGIME IS WRONG AND UNJUST

The preamble to the FSA notes that the Act was intended to “restore fairness to Federal cocaine sentencing.” FSA Pmbl., 124 Stat. 2372. The obvious implication is not only that the FSA introduced a new regime, but that the previous sentencing regime was unfair. Indeed, when the FSA was passed, members of Congress expressly noted that the old crack/powder cocaine disparity was wrong, even “contrary to our fundamental principles of equal protection under the law.” 156 Cong. Rec. H6196-01, 2010 WL 2942883 (daily ed. July 28, 2010) (statement of Rep. Clyburn).

The FSA followed “almost universal criticism” of the sentencing disparity between penalties for powder cocaine offenses and those for crack. U.S. Sentencing Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (May 2007) (“2007 Report”). In a 1995 report to Congress, the Sentencing Commission noted that the adoption of the 100-to-1 ratio in the treatment under federal law of “two easily convertible forms of the same drug” produced a

variety of “extreme anomalies in sentencing.” U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 197 (Feb. 1995) (“1995 Report”). A major trafficker in powder cocaine could receive a shorter prison sentence than the street-level dealer who bought from that trafficker and converted the powder cocaine to crack. See *Kimbrough v. United States*, 552 U.S. 85, 95 (2007). More troubling, the impact of these sentencing disparities fell disproportionately on racial minorities. 1995 Report 192. In 1997, the Commission reiterated “firmly and unanimously” its conclusion that the 100-to-1 ratio was unjustifiable. U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (Apr. 1997) (“1997 Report”). The 100-to-1 disparity resulted in a widespread “perception of unfairness and inconsistency” in federal sentencing. *Id.* at 8.

In 2002, the Commission stated even more clearly that the initial sentencing ratio had been enacted in error. It explained that “[t]he 100-to-1 drug quantity ratio was established based on a number of beliefs” about the dangers of crack cocaine “that more recent research and data no longer support.” U.S. Sentencing Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 91 (May 2002) (“2002 Report”). Under the circumstances, the Commission again concluded that the differential is “unjust” and perpetuated racial disparities. *Id.* at 100, 103.

By 2007, the Commission determined that “the problems associated with the 100-to-1 drug quantity ratio” were “so urgent and compelling” that it would address some of them on its own, but recognized that this was an interim solution and that legislative action was necessary. 2007 Report 9. Further, the Commission noted that the “100-to-1 drug quantity ratio significantly undermines the various Congressional objectives set forth in the Sentencing Reform Act.” 2007 Report 8.

The Commission urged Congress to include in any ameliorative legislation a grant of “emergency amendment authority” to permit the Commission to immediately incorporate the changes in the federal Sentencing Guidelines, and to minimize the lag between statutory and Guidelines modifications. 2007 Report 9. Plainly responding to the urgency of that recommendation, and finally responding to the Commission’s conclusions, Congress adopted the FSA, and in particular § 8 of the Act. Section 8 instructs the Commission to promulgate new guidelines consistent with the FSA “as soon as practicable” and “not later than 90 days after the enactment of the Act.” § 8, 124 Stat. 2372.

The Commission’s concerns about the 1986 Act have been echoed by federal judges from one end of the country to the other. As Judge Cassell noted in testimony before the House Judiciary Committee, speaking about mandatory-minimum penalties in general, such penalties inflict damage on the “logic and rationality in our nation’s federal courts.”

Statement on Behalf of the Judicial Conference of the United States Before the H. Judiciary Subcomm. on Crime, Terrorism & Homeland Security, 19 FED. S. REP. 344, 344 (2007) (statement of J. Paul G. Cassell). Mandatory-minimum sentencing schemes can produce sentences in individual cases that are “unjust, cruel, and even irrational.” *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

More recently, in addressing the scope of the FSA, sentencing judges have been unable to articulate any legitimate reason why Congress would want “to continue to require that courts impose unfair and unreasonable sentences on those offenders whose cases are still pending.” *United States v. Acuff*, 634 F.3d 200, 205 (2d Cir. 2011) (Lynch, J., concurring); see also *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010) (“What possible reason could there be to want judges to *continue* to impose new sentences that [Congress has declared to be unfair] over the next five years while the statute of limitations runs?”); *United States v. Parks*, No. 8:10CR225, 2010 WL 5463743, at *7 (D. Neb. Dec. 28, 2010) (noting “[t]he government has not identified any valid congressional interest that would be served by continuing to apply the now discredited and repudiated 100-to-1 ratio to those defendants who would now be categorized as minor crack offenders[,]” and deciding that to “continue to sentence defendants under a formula that is uniformly regarded as unfair and unjust” [would] “frustrate the expressed

congressional goals of remedying racially discriminatory impact[.]”¹

The Executive, too, has acknowledged these fundamental concerns. Most notably, the United States has commendably recognized in this litigation that the FSA properly applies immediately in sentencing proceedings following its enactments.

II. CONTINUING TO SENTENCE UNDER THE PRE-FSA MANDATORY MINIMUMS IS INCONSISTENT WITH THE PURPOSES OF SENTENCING UNDER 18 U.S.C. § 3553(A)

Amici were charged with sentencing individuals under the mandate and purposes of sentencing set forth in 18 U.S.C. § 3553(a). Our former colleagues continue to face that solemn task on a daily basis. The position adopted by the Seventh Circuit – that, for several years to come, the FSA should remain inapplicable to many individuals sentenced after its enactment – is wholly inconsistent with the purposes of sentencing under § 3553(a). Congress has acknowledged as much in adopting the findings of the Sentencing Commission over the past two decades, and in its deliberations on the FSA.

¹ These are but three examples. During the first year after the enactment of the FSA, dozens of district courts across the country held that the statute’s ameliorative provisions apply to all defendants sentenced after the FSA’s enactment, regardless of when the offense conduct occurred.

The FSA represents Congress's assessment that the prior penalties are no longer needed to deter offenders. No potential criminal will decide to commit a crime because of the chance that even if he gets caught, one day the legislature might reduce the punishment for that crime. Likewise, with respect to incapacitation, Congressional action in reducing the mandatory penalties suggests that *less* punishment will suffice to protect society. And the FSA underscores Congress's determination that the old penalties are inconsistent with a just sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). It reflects, in effect, a new scientific and social view of crack cocaine – that it is not as much a threat as once feared, that the penalties need not be as severe, and even that the prior penalties were disproportionate to the conduct when compared to the penalties for powder cocaine. In short, there is no basis to support imputing to Congress any intention to "inflict[] punishment at a time when it can no longer further any legislative purpose[.]" *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964).

Just as important, and based on our first-hand experience on the bench, continuing an unwarranted crack/powder disparity will have a corrosive impact on the deterrent effect of all federal criminal sentences. Many Americans, particularly in minority communities, have come to regard the federal criminal justice system with suspicion because of the ill-founded crack/powder disparity. These skeptics believe that the ratio is racist and that the resulting

lengthy sentences are unjust. That harmful perception will continue and, indeed, be strengthened if this Court refuses to immediately apply Congress's corrective action.

To be effective, the federal criminal justice system must have the full trust of the public. The system cannot work unless citizens willingly report crimes to police, testify as witnesses before grand juries and at trial, and serve on juries that must unanimously determine guilt. The crack/powder disparity has already done serious damage to public confidence in federal law enforcement, particularly in the high-crime inner-city communities that most desperately need policing efforts. These costs to the system far outweigh whatever marginal incapacitative or other advantage might seemingly stem from applying to crack dealers the full measure of a now-discredited sentencing regime.

Congress recognized these serious problems in enacting the FSA. The Court should hasten to implement Congress's corrective action before any further damage is done.

III. CONTINUING TO SENTENCE UNDER THE PRE-FSA MANDATORY MINIMUMS FUNDAMENTALLY UNDERMINES THE GUIDELINES REGIME

Section 8 of the FSA directs the Sentencing Commission to amend the relevant guidelines within 90 days to conform them to the provisions of the new

statute. The Commission did so. The new sentencing guidelines are applicable at all sentencing hearings that occur after they were promulgated, regardless of when the crimes for which the sentences are being imposed were committed. 18 U.S.C. § 3553(a)(4)(ii). Unless the FSA's revised mandatory-minimum penalties are also applied, these defendants will receive sentences higher than dictated by the guidelines that Congress urged the Commission to adopt and intended to apply to these defendants. The results, as Judge Posner has recognized, are "perverse." *United States v. Holcomb*, 657 F.3d 445, 462 (7th Cir. 2011) (Posner, J., dissenting).

Moreover, the Seventh Circuit's approach introduces the anomaly that major crack traffickers being sentenced for pre-FSA conduct will get the benefit of the ameliorated crack/powder disparity, while minor ones being sentenced for pre-FSA conduct will not. That is because the ameliorative Guidelines amendments mandated by the FSA will determine the sentencing ranges of those trafficking in enough crack to make their Guidelines ranges fall *above* the old mandatory minimums, whereas the old mandatory minimums will be the Guidelines sentence for those minor offenders whose Guidelines ranges fall *below* the old mandatory minimums. See U.S.S.G. § 5G1.1.

Or consider the following: an offender, in one courtroom, who distributed 7 grams of crack the day after the FSA's enactment but not sentenced until two years later would get the benefit of the FSA. He would be subject to an ameliorated Guidelines

sentence - and no mandatory minimum. But an offender, in the next courtroom, who distributed the same quantity the day before the enactment would get no benefit, and would be sentenced to the old mandatory minimum. Nothing in the FSA legitimizes this result.

Anytime a penalty is ameliorated, a line must be drawn between those who receive the benefit of a lower penalty and those who do not. There are sound reasons for leaving final judgments undisturbed. But there is no persuasive reason for applying different penalties to individuals not yet sentenced, particularly since doing so perpetuates the injustice Congress was attempting to remedy.

More poignant, as to the defendant subject to that mandatory-minimum penalty that everyone acknowledges is unfair, Judge John Gleeson of the Eastern District of New York described the reaction best:

The absence of fit between the crude method of punishment [a five-year mandatory minimum] and the particular set of circumstances before me was conspicuous. * * * [W]hen I imposed sentence on the weak and sobbing [defendant], everyone present, including the prosecutor, could feel the injustice.

United States v. Vasquez, No. 09-CR-259 (JG), 2010 U.S. Dist. LEXIS 32293, at *14-15 (E.D.N.Y. Mar. 30, 2010). The signatories to this brief, like their

colleagues still on the bench, well understand that feeling.

CONCLUSION

For the foregoing reasons, and for those set forth in the briefs filed on behalf of petitioners, this Court should reverse the decisions of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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**AMICUS
CURIAE
BRIEF**

Nos. 11-5683 and 11-5721

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OF THE CLERK

IN THE

Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

COREY HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND
NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS AS *AMICI CURIAE* IN SUPPORT
OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers (“NACDL”) is a non-profit professional bar association that represents the nation’s criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of approximately 10,000 direct members and an additional 35,000 affiliate members in all 50 states and 30 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states.

The National Association of Federal Defenders (“NAFD”) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

The broad application of the Fair Sentencing Act is vital to the interests of NACDL and NAFD’s members, as is an interpretation of the General Saving Statute, 1 U.S.C. § 109, that is narrow and limited to the purpose of preventing technical abatement.¹

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in

SUMMARY OF ARGUMENT

Section 109 of title 1, U.S. Code, precludes only “technical abatement,” which operates to deprive the government of the power to continue ongoing prosecutions. Under the common law rule of technical abatement, an amended statute is regarded as effectively repealed through repeal and re-enactment, and the government’s power to prosecute pending crimes is thereby extinguished. In 1871, Congress was engaged in an effort to re-enact U.S. law in codified form, which became the Revised Statutes of 1874. What is now 1 U.S.C. § 109 was adopted at that time for the limited purpose of preventing widespread technical abatement, which otherwise would have resulted from the re-enactment of U.S. law in codified form.

This Court in *Warden v. Marrero*, 417 U.S. 653 (1974), departed from the narrow purpose of § 109. In an alternate holding that was unnecessary to the decision, the Court misconstrued technical abatement to preclude application of ameliorated penalties to pending proceedings. This Court should take the occasion in this case to repudiate the discussion of § 109 in *Marrero*, on which the court below wrongly relied. Section 109 does not prevent the application of the Fair Sentencing Act to pending proceedings because the application of an ameliorated penalty does not come within the technical abatement rule. Deciding otherwise would misconstrue § 109 and

part and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certifies that counsel of records for both parties received timely notice of *amici curiae*’s intent to file this brief and have consented to its filing in letter on file with the Clerk’s office.

frustrate the intent of Congress in passing the Fair Sentencing Act.

ARGUMENT

I. SECTION 109 PRECLUDES ONLY TECHNICAL ABATEMENT AND SHOULD NOT BE READ TO FRUSTRATE THE IMMEDIATE APPLICATION OF AMELIORATIVE STATUTES

A. Technical abatement was a loophole in the common law.

Technical abatement is a common law rule that entirely deprives the government of the power to prosecute offenses committed prior to a statutory amendment. As this Court recognized in *Bradley v. United States*, 410 U.S. 605, 608 (1973), a classic example of technical abatement is the case of *R. v. M'Kenzie*, 168 Eng. Rep. 881 (Ct. Cr. Cas. Rev. 1820). The defendants were convicted of “feloniously stealing . . . , on the 11th of July, 1820, twenty-three yards of lace, value one pound three shillings” *Id.* However, on July 25, 1820, Parliament amended the grand larceny statute, reducing the penalty from death to life imprisonment. The English court held that the defendants could not be held liable under either statute—the new one because it was enacted after the crime and the old one because it had been effectively repealed. *Id.*

The technical abatement that occurred in *M'Kenzie* is best understood as a counterintuitive loophole in the common law that is different from classic abatement. Abatement—as distinguished from technical abatement—is the “universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State’s

condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct." *Bell v. Maryland*, 378 U.S. 226, 230 (1964). Abatement applies purely to "unqualified repeal of a criminal statute." Note, *Today's Law & Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 121 (1972). Abatement *per se* is a sound legal principle, for it makes little sense to continue to hold individuals liable for behavior that is no longer condemned by the law as culpable. See *id.* at 122 n.16 (noting that it is "logical and reasonable" to conclude that an unqualified repeal is a legislative "determination that that the former legislation was no longer socially necessary or desirable").

Classic abatement doctrine "has also been consistently recognized and applied by this Court," especially in the criminal context. *Bell*, 378 U.S. at 231 n.2; accord *Massey v. United States*, 291 U.S. 608, 609 (1934) (per curiam); *United States v. Chambers*, 291 U.S. 217, 223 (1934). In *Chambers*, the Court affirmed dismissal of a prosecution brought under the National Prohibition Act. 291 U.S. at 222–23. The indictment was filed on June 5, 1933, six months before enactment of the Twenty-First Amendment on December 5 of that year. *Id.* at 221–22. On December 6, "Chambers then filed a plea in abatement, and . . . [t]he District Judge sustained the contention and dismissed the indictment." *Id.* This Court affirmed the dismissal because "[t]he continuance of the prosecution of the defendants . . . would involve an attempt to continue the application of the statutory provisions after they had been deprived of force." *Id.* at 222–23. The Court stated that "it has long been settled, on general principles, that after the

expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Id.* at 223 (internal quotation marks omitted) (quoting *Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809) (Marshall, C.J.)).

Technical abatement, by contrast, occurs because "[a]t common law, . . . abatement by repeal included a statute's repeal and re-enactment with different penalties." *Bradley*, 410 U.S. at 607–08 (citing 1 J. Sutherland, *Statutes and Statutory Construction* § 2031 n.2 (3d ed. 1943)); see also Note, *supra*, at 123 ("[R]epeal also historically include[d] the situation of repeal and re-enactment with different penalties . . ."). For technical abatement, it made no difference if the new penalties were harsher or more lenient. *Bradley*, 410 U.S. at 607–08. Thus, if a legislature replaced the penalty for a crime by repealing the old statute and simultaneously replacing it with a new one—even one that "covers the whole subject of the first," *United States v. Tynen*, 78 U.S. 88, 92 (1870)—the technical abatement doctrine would entirely deprive the government from proceeding with pending prosecutions. The amendment of a statute was interpreted to express "the legislative will . . . that no further proceedings be had under the [A]ct repealed." *Id.* at 95. As a result, all prosecutions of offenses committed prior to the amending statute had to cease. "The continued prosecution necessarily depends upon the continued life of the statute which the prosecution seeks to apply." *Chambers*, 291 U.S. at 223. This was precisely the scenario in *M'Kenzie*, and precisely the scenario that § 109 was enacted to correct. The power to prosecute such offenses had to be preserved.

B. Section 109 was only intended to close the technical-abatement loophole as part of the codification effort.

The General Saving Statute provides, in relevant part:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. On its face, the General Saving Statute only operates (absent contrary congressional intent, express or implied, in the statute at hand) to preserve a penalty that has already been “incurred” and only when the prior statute has been “repealed.” Amici NACDL and NAFD endorse the arguments of the parties that the Fair Sentencing Act demonstrates such a contrary intent and the arguments of petitioners that § 109, by its plain language, does not operate to preserve the prior mandatory minimums in any event. The argument presented here is that the General Saving Statute does not apply for yet another, historical reason—that the immediate application of the FSA’s penalties to ongoing prosecutions does not create what would at common law be considered a technical abatement. Technical abatement is the complete deprivation of the power to prosecute, not an amelioration of penalties.

The above-quoted portion of § 109 was originally enacted—verbatim—in 1871 as § 4 of a larger bill

entitled “An Act Prescribing the form of the enacting and resolving clauses of acts and resolutions of Congress, and rules for the construction thereof.” H.R. 1351, 41st Cong. (3d Sess. 1871). The bill was requested by the Committee on Revision of Laws of the United States, Cong. Globe, 41st Cong., 2d Sess. 2464 (1870), and was primarily concerned with semantic matters, such as prescribing the exact phrase to be used in the enacting clause of bills, or specifying that masculine pronouns can be assumed to refer to both men and women. *Id.* at §§ 1–2; 16 Stat. 431, 431–32 (1871).

The bulk of the debate in Congress focused on the semantic issues, with no discussion of § 4 itself. See Cong. Globe, 41st Cong., 2d Sess. 2464–67 (recording the floor debate in the House); Cong. Globe, 41st Cong., 3d Sess. 775–78 (1871) (recording the floor debate in the Senate); see generally John P. Mackenzie, *Hamm v. City of Rock Hill and the Federal Savings Statute*, 54 Geo. L.J. 173, 177–80 (1965). The overall purpose of the bill, though, was to “save a good deal of verbiage in the statutes,” to “simplify the phraseology of our statutes,” and to “simplif[y] the mode of enactment.” Cong. Globe, 41st Cong., 3d Sess. 775 (statement of Senator Trumbull). The original sponsor of the bill, Congressman Poland, maintained that “[t]he object is merely to secure a better style for bills and to dispense with the tautology which is in such common use.” Cong. Globe, 41st Cong., 2d Sess. 2465.

Key to understanding § 109 is that it was introduced to assist in the effort to codify the laws of the United States. See generally Mackenzie, *supra*, at 176. The Commission assigned to this “mammoth task”—comprised of commissioners appointed by the President and confirmed by the Senate—was to issue

reports with “proposed *reenactments* of the laws into code arrangements,” and “suggest to Congress such . . . statutes or parts of statutes as, in their judgment, ought to be repealed, with their reasons for such repeal.” *Id.* (emphasis added). The effort culminated in the adoption of the original Revised Statutes, in 1874. In this light, it is clear why the general saving clause was required—to prevent a wave of technical abatements as a result of the reenactment of United States criminal law as part of the codification process.

The floor debates confirm this interpretation of § 109. As Congressman Hoar put it, “the scope of this bill [is] to construe ordinarily recurring words and phrases *in existing laws*.” Cong. Globe, 41st Cong., 2d Sess. 2465 (emphasis added). Congressman Hoar continued: “It seems, with the exception of the provision about the enacting clause, this is a bill for construing the phrases *in existing laws, not laws to be hereafter enacted*.” *Id.* (emphases added). Indeed, the Senate sponsor, Lyman Trumbull, explicitly recognized that “[w]e cannot pass a law that will bind other Congresses.” Cong. Globe, 41st Cong., 3d Sess. 775; cf. *Lockhart v. United States*, 546 U.S. 142, 149-50 (2005) (Scalia, J., concurring) (pointing out the “invalidity of [any] express-reference provision” that “attempt[s] to burden the future exercise of legislative power”).

This Court recognized in *Hamm v. Rock Hill*, 379 U.S. 306, 314 (1964), that the limited purpose of § 109 was “to obviate mere technical abatement,” such as what would result from the re-enactment of all criminal law during codification or the amendment of a law to increase its penalty. *Id.* It was not intended to bind the hands of future Congresses in prospectively applying reduced penalties. Indeed,

Congress re-enacted into positive law § 109 itself in 1947, 61 Stat. 635 (July 30, 1947)—this time, as part of an “ambitious” program “having as [its] ultimate purpose the enactment into positive law of all the titles of the United States Code.” H.R. Rep. No. 80-251, at 2 (1947). The enactment into positive law would have presented the same risk of a wave of technical abatements, just as did the codification effort in the 1870s. Section 109 was enacted—and re-enacted—to prevent this from happening.

Neither of the two purposes of the General Saving Statute—preventing technical abatement and simplifying the enactment process for future legislators—justifies using it to prevent the application of ameliorative statutes in ongoing prosecutions. Indeed, it would be the height of irony to use a statutory provision meant to simplify the lives of future legislators to bind their hands instead. The narrow purpose of § 109 was to preserve the powers of the government to punish defendants in cases of technical abatement, not to leave offenders subject to an amended law’s penalties deemed by Congress to be unfair and unjust.

II. SECTION 109 DOES NOT APPLY TO THE FAIR SENTENCING ACT OF 2010

A. Ameliorative amendments are not barred by § 109, and Supreme Court precedent to the contrary is based on a misconstruction of technical abatement.

In *Hamm*, this Court recognized that § 109 was created for the limited purpose of rebutting the presumption of technical abatement, thereby preserving the power to prosecute ongoing proceedings. 306 U.S. at 312-14. “It was meant to obviate mere technical abatement such as that

illustrated by the application of the rule in *Tynen* decided in 1871. There a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution." *Id.* at 314. Section 109 preserves the power to prosecute ongoing proceedings in cases of repeal and re-enactment but does not extend to preserve prior penalties. In *Hamm*, this meant that § 109 would not preserve a conviction inconsistent with the newly enacted Civil Rights Act of 1964. The Civil Rights Act "work[ed] no such technical abatement." *Id.* (Hence, this Court held, the Supremacy Clause invalidated the state convictions at issue there, which had not become final when the Civil Rights Act went into effect.) Here, § 109 operates to preserve the power to continue ongoing prosecutions, thereby rebutting the presumption of technical abatement. But that is the extent of its role. It cannot also operate to hamstring a later Congress intending to apply reduced penalties to ongoing prosecutions. Not only would this contravene Congress's intent in enacting the FSA, but it would work an extension of §109 beyond its original scope.

This Court in *Bradley* read the express savings clause of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, against its explication of common law abatement to find the law's favorable parole eligibility rules to be inapplicable to defendants sentenced after its enactment but whose offenses occurred prior to that date. 410 U.S. 605. In a brief concurring opinion, two Justices opined that they would rest the decision on the additional ground that § 109 required the same result. *Id.* at 611-12.

The Court examined the parole provisions of the 1970 Act in another context in *Marrero*, 417 U.S. 653 (1974). In an alternate holding that was unnecessary

to the decision, the Court extended the *Bradley* concurrence and departed from the limited purpose of § 109. 417 U.S. at 659-64. At issue was whether defendants convicted under a narcotics statute that prevented offenders from seeking parole could take advantage of the later statute providing parole eligibility. As noted, the later statute included its own savings clause, and the Court held that the clause prohibited application of the ameliorated penalties. *Id.* at 657-59. But in an alternate holding, this Court went on to address whether § 109 independently prohibited the application of the ameliorative law. The Court correctly noted that the purpose of § 109 was to "abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.'" *Id.* at 660 (quoting *Bradley*, 410 U.S. at 607). But the Court went on to improperly expand the scope of §109.

The Court in *Marrero*, citing the same two nineteenth century cases as *Bradley* without conducting any new historical analysis, misconstrued technical abatement. It found that if defendants convicted under the repealed statute received the benefits of the ameliorative law, their "prosecution would 'technically' abate under the common-law rule." *Id.* at 660 n.11. As a result, the Court held that the General Saving Statute prevented application of the ameliorative law and thereby prohibited parole eligibility. *Id.* at 659. But applying an amended sentence to reduce its severity does not implicate technical abatement; rather, technical abatement results in the dismissal of the indictment because the government is deprived of the power to prosecute offenses committed prior to the amending statute.

Nowhere is abatement doctrine properly understood to include the mere reduction of a penalty. Technical abatement means that "there was no offence remaining for the court to punish in virtue of that section." *Tynen*, 78 U.S. at 95. It necessarily extinguishes the power of the prosecutor to proceed. "[I]f the prosecution continues the law must continue to vivify it." *Chambers*, 291 U.S. at 226.

Based on its misconstruction of the technical abatement doctrine, the Court in *Marrero* expanded the scope of § 109 to preclude application of ameliorated penalties. This Court should acknowledge and repudiate the error made in *Marrero* and confine the scope of § 109 to its original purpose of reversing the presumption of technical abatement, understood as "the legislative will . . . that no further proceedings be had under the [A]ct repealed." *Tynen*, 78 U.S. at 95.

B. Application of the Fair Sentencing Act to ongoing proceedings is otherwise consistent with this Court's jurisprudence.

In cases where § 109 does not apply, this Court has never hesitated to apply ameliorative statutes to pending proceedings. See *Dobbert v. Florida*, 432 U.S. 282, 294-95 (1977) (rejecting challenge to application of changed death penalty law to pending cases, because "[t]he Florida legislature enacted the new procedure specifically to provide . . . defendants with more, rather than less, judicial protection"); cf. *Weaver v. Graham*, 450 U.S. 24, 37-38 (1981) (Rehnquist, J., concurring) (finding that ameliorative sentence-adjustment laws could apply immediately to all prisoners, but that the challenged statute was, on balance, not ameliorative). At issue in *Weaver* was a Florida statute that changed the calculation of a

prisoner's "gain time for good behavior." 450 U.S. at 25-26, 34 n.20. In addressing an Ex Post Facto Clause challenge to the law, this Court squarely held that immediately applying the new statute—which lacked a saving clause—necessarily applied retroactively because it would inevitably affect prisoners who committed their crimes before the effective date of the statute. *Id.* at 27 n.4, 31–32. Although the Court struck down the Ex Post Facto portion of the statute in *Weaver* as it applied to the petitioner, it did so specifically because it was not ameliorative. *Id.* at 34–35; see *id.* at 36 n.22 ("[O]nly the *ex post facto* portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him"); see also *id.* at 37–38 (Rehnquist, J., concurring) (finding "this case a close one" and stating that had the statute *in toto* been ameliorative, its immediate application should be upheld); *Dobbert*, 432 U.S. at 292 n.6 (emphasizing that the ameliorative nature of a statute is an "independent bas[i]s" for upholding immediate application of a criminal law). The logic of *Weaver* and *Dobbert* should apply with equal force here. The FSA is plainly ameliorative, it does not contain a specific saving clause, and § 109 is no bar. The ameliorative provisions of the Fair Sentencing Act should therefore apply at every sentencing taking place on or after August 3, 2010, the date the Act went into effect.

This result is particularly important in the criminal law context, where congressional reduction of a penalty represents a legislative recognition that the previous penalty no longer fulfills the purposes of punishment and sentencing, including "retribution, deterrence, incapacitation, and rehabilitation." *Tapia v. United States*, 131 S. Ct. 2382, 2384 (2011); see

also 18 U.S.C. § 3553(a)(2) (2006) (listing these four purposes as factors to be considered when imposing a sentence); Model Penal Code § 1.02(2) (2001) (listing eight purposes of sentencing); see generally S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 10–11 (2009).

An ameliorative statute “represents a legislative judgment that the lesser penalty . . . is sufficient to meet the legitimate ends of the criminal law.” *People v. Oliver*, 134 N.E.2d 197, 202 (N.Y. 1956); accord Mitchell, *supra*, at 12–17. No social utility is gained from imposing “sentences that have been acknowledged by Congress as unjust.” *United States v. Fisher*, 646 F.3d 429, 430 (7th Cir. 2011) (Williams, J., dissenting from a denial of rehearing), *cert. denied*, No. 11-6096, 2011 WL 3812692 (U.S. Nov. 28, 2011); cf. *Dobbert*, 432 U.S. at 294–95. Indeed, this Court has held that § 109, as applied to civil cases, “embodies a principle of fair dealing,” *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 389 (1953) (evaluating whether § 109 bars extinguishment of certain claims in admiralty), and using it—contrary to its original purpose—to *force* courts to apply an “unjust” sentence would patently violate this principle.

There is an “overriding necessity of a sentence which . . . adequately expresses the community’s view of the gravity of the defendant’s misconduct.” Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 Law & Contemp. Probs. 401, 437 (1958). And the “community’s view,” of course, is expressed through its elected representatives. See *id.* Congress passed the FSA “[t]o restore *fairness* to Federal cocaine sentencing.” Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372 (emphasis added). As one

district court put it, “what possible reason could there be to want judges to *continue* to impose new sentences that are not ‘fair’ over the next five years while the statute of limitations runs?” *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010) (emphasis in original), *aff’d*, 644 F.3d 39 (1st Cir. 2011).

C. The Seventh Circuit’s rule, if applied broadly, will impose significant social costs, contrary to Congress’s intent.

Enforcing a penalty harsher than Congress has deemed just imposes significant social costs, including the cost of incarceration. See Hart, *supra*, at 438 (“Of all the forms of treatment of criminals, prison sentences are the most costly to the community not only because of the out-of-pocket expenses of prison care, but because of the danger that the effect on the defendant’s character will be debilitating rather than rehabilitating.”).

Refusing to apply the FSA on the basis of § 109 would contravene Congress’s clearly ameliorative intent. This Court has squarely held that § 109 “cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment.” *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). “[O]ne legislature cannot abridge the powers of a succeeding legislature,” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810), and § 109 simply cannot be construed to allow the 41st Congress to abridge the powers of the 111th.

Congress, after years of debate, decided to alleviate the 100:1 crack-to-cocaine sentencing disparity in light of its growing recognition of mistaken factual assumptions that led to establishment of the 100:1

ratio, as well as the “significant racial disparities that it produced in federal drug sentencing.” *Douglas*, 746 F. Supp. 2d at 222; accord *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (noting that the 100:1 ratio “fosters disrespect for and lack of confidence in the criminal justice system’ because . . . the severe sentences required by the 100-to-1 ratio are imposed ‘primarily upon black offenders.’” (quoting United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, at iv (May 2002), available at http://www.ussc.gov/_congress/crack/crackrpt.pdf)).

Congress intended the ameliorative changes to apply as soon as possible, and gave the Sentencing Commission “emergency authority” to promulgate new guidelines “as soon as practicable.” Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372, 2374. As Judge Williams pointed out, this emergency authority would be pointless—and § 8 of the FSA would be reduced to mere surplusage—if Congress intended the sentencing courts to look to the old, repealed statute for guidance. *Fisher*, 646 F.3d at 432 (Williams, J., dissenting from a denial of rehearing). Refusing to apply the ameliorative statute can “serve no purpose other than to satisfy a desire for vengeance.” *Oliver*, 134 N.E.2d at 202.

CONCLUSION

For the foregoing reasons, in addition to those advanced by the petitioners, this Court should reverse the decisions of the U.S. Court of Appeals for the Seventh Circuit.

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